COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

Middlesex, ss. 2014-P-1853

Federal National Mortgage Association

Plaintiff-Appellee

v.

Edward M. Rego and Emanuela R. Rego

Defendants-Appellants

On Appeal from the Judgment of the

Northeast Housing Court

Brief of Appellants

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Introduction

Massachusetts is still confronting the fall-out of the largest foreclosure epidemic since the Great Depression. The vast majority of homeowners who have been ensnared in the crisis and are losing their homes only "have their day in court" in the summary process action after foreclosure has occurred. As Massachusetts is a non-judicial foreclosure state, the foreclosing banks do not have to receive approval of a court before they foreclose; instead they are required to strictly comply with the power of sale contained in the mortgage and statute. See G.L. c. 183, § 21. As the Supreme Judicial Court reiterated in U.S. Bank, N.A. v. Ibanez:

> Recognizing the substantial power that the statutory scheme affords to a mortgage holder to foreclose without immediate judicial oversight, we adhere to the familiar rule "one who sells under a power (of sale) must follow strictly to its terms."

458 Mass. 637, 646 (2011), quoting Moore v. Dick, 187 Mass. 207, 211 (1905). "One of the terms of the power of sale that must be strictly adhered to is the restriction on who is entitled to foreclose." Ibanez, 458 Mass. at 647. An entity exercising the power of sale must be authorized under G.L. c. 244 § 14, and must strictly comply with the provisions of § 14. Accordingly, a foreclosure is invalid if carried out by an unauthorized party. Id. While the

SJC has recently recognized that Massachusetts "jurisprudence in this area of law is difficult for even attorneys to understand," the central tenet of foreclosure jurisprudence is not difficult to understand: unless an authorized party exercises the power of sale, and does so in strict compliance with the relevant statutes and mortgage terms, the sale is void. See U.S. Bank, N.A. v. Schumacher, 467 Mass. 421, 431 (2014) (Gants, J., concurring).

Here, the plain language of G.L. c. 244 § 14 provides that when a foreclosure is done by an attorney rather than by the mortgagee itself, the attorney taking the steps prescribed by that statute to exercise the power of sale may only do so after being "duly authorized by a writing under seal." This language was added to the statute by the Legislature by St. 1906, c. 219, § 1, following the Supreme Judicial Court's holding in Cranston v. Crane, 97 Mass. 459 (1867) that verbal authorization from the mortgagee was sufficient, and the amendment must be given full effect. Furthermore, requiring foreclosing banks to comply with this requirement imposes no significant burden, not only because completing such an authorization would cost nearly nothing and take almost no time, but because in many cases, the instant case included,

foreclosing mortgagees often do execute written authorizations, but often (as here) do so after the foreclosure sale is conducted. Here, the Court erred in granting possession to the Appellee because the attorney preparing, sending, and publishing the notices of sale was not authorized to do so under § 14.

The Housing Court also erred in ruling that it did not have jurisdiction to consider the Homeowners' G.L. c. 93A counterclaims. In a post-foreclosure summary process action, the owner, in addition to any defenses he may have, may also assert counterclaims, including counterclaims alleging that the foreclosure was conducted in violation of G.L. c. 93A. Bank of America v. Rosa, 466 Mass. 613, 626 (2013). Requiring post-foreclosure homeowners to file separate causes of action in the Superior Courts (rather than litigating their claims in the summary process case) would be contrary to the SJC's concern for judicial efficiency expressed not only in Rosa but also in Bank of New York v. Bailey, 460 Mass. 327 (2011).

Accordingly, this court should vacate the judgment of the Housing Court, and should declare the foreclosure sale on May 27, 2011 void, award the homeowners possession, and remand to the Housing Court for further proceedings on Appellants' counterclaim.

Issues of Law Presented for Review

1. Whether the purported foreclosure sale of the Appellants' home is void because the statutory notices of intent to sell at foreclosure auction were prepared, mailed and published by an attorney who was not "duly authorized by a writing" as required by G. L. c. 244, § 14, rather than by the mortgagee itself.

2. Whether the Plaintiff-Appellee failed to establish its prima facie case when it was based on an Affidavit of Sale that was executed by the attorney, even though the attorney was not "duly authorized by a writing" as required by G.L. c. 244, § 15 and was not based on the personal knowledge of the attorney regarding the actions of the mortgagee.

3. Whether the Northeast Housing Court erred in dismissing Defendant-Appellant's counterclaims under G.L. c. 93A for lack of jurisdiction.

Statement of the Case

Prior Proceedings

This matter is a residential summary process case, brought by the Plaintiff, Federal National Mortgage Association ("Fannie Mae") , in the Northeast Housing Court against the homeowners, Edward M. Rego and Emanuela R. Rego ("the Regos") after their interest in their home was purportedly foreclosed by sale. R. App. 9-10. The Regos filed an answer asserting that Fannie Mae had no superior right to possession and including an affirmative defense and counterclaims under G.L. c. 93A. R. App. 11-14.

The parties agreed to ajoint statement of stipulated facts. R. App. 83-85. Fannie Mae moved for summary judgment. R. App. 23-82. The Regos filed an opposition to Fannie Mae's motion and cross-moved for summary judgment. R. App. 159-250. In their motion, the Regos argued that the foreclosure was void. R. App. 159-250. Additionally, the Regos moved to strike two affidavits offered by Fannie Mae, on the grounds that they did not comport with the statutory forms for an Affidavit of Sale and/or were not based on personal knowledge. R. App. 145-158. Fannie Mae filed an opposition to the Regos' motion to strike. R. App. 250-255. From the bench the Northeast Housing Court (Sullivan, J.) denied the Regos' motion to strike. R. App. 338. On the cross motions for summary judgment, the Court issued a written order granting Fannie Mae possession, and scheduled a trial on the Regos' counterclaims. R. App. 315-316.

Fannie Mae then filed a motion to dismiss the Regos' counterclaims for lack of jurisdiction. R. App. 317-323. The Regos filed an opposition to Fannie Mae's motion to dismiss. R. App. 324-327. The Court allowed Fannie Mae's motion to dismiss. R. App. 328. The Housing Court entered its final Judgment on July 11, 2014. R. App. 329. The Regos filed a timely appeal of the Housing Court

judgment for possession to the bank and dismissal of their counterclaim. R. App. 330-331.

Statement of Facts

The Regos purchased their home in 1976. R. App. 11. In 1995, the Regos refinanced their home mortgage loan. They borrowed $122,000 from Empire of America Realty Credit Corp. and executed a mortgage in its favor. R. App. 87-96. Subsequently, GMAC Mortgage, LLC, ("GMAC") became the mortgagee after a series of assignments. R. App. 98-104.

In the years leading up to foreclosure, on numerous occasions, GMAC charged the Regos multiple late fees in a single month. R. App. 179, 239-249. However, the note underlying the mortgage specifically provides that a late fee shall be charged "only once on each late payment." R. App. 87. As a result, GMAC inflated the Regos' delinquency, making it more difficult for them to avoid foreclosure, and ultimately leaving them with greater liability toward the deficiency after foreclosure sale.

The Regos fell behind on their mortgage payments and tried to save their home by applying, first, for an affordable loan modification (R. App. 12, 121), and second, for a reverse mortgage (R. App. 12, 141). The Orlans Moran law firm prepared on the firm's own letterhead

and mailed the Regos a Notice of Intention to Foreclose on their home dated May 4, 2011. R. App. 59, 65. Orlans Moran subsequently published a Notice of Sale in the Billerica Minuteman on May 5, 12, and 19, 2011. R. App. 62, 65.

In the critical days leading up to the date of foreclosure, GMAC sent the Regos two notices. R. App. 143-144, 236-237. On May 25, 2011, GMAC sent the Regos a notice stating "we are currently processing your modification request and will notify you within 30 days of the outcome of our review." R. App. 236-237. The notice further provides that GMAC "will not refer the account to foreclosure or conduct a foreclosure sale if already referred while it [your loan] is being reviewed for the Home Affordable Modification Program."[1] Id. However, on May 26, 2011, the day before the foreclosure sale, GMAC sent the Regos a check-box notice stating, "In connection with your request for a loan modification, we

[1] The Home Affordable Modification Program, is a component of the Making Home Affordable Program [MHAP] program established by the United States Department of the Treasury under the Troubled Asset Relief Program [TARP] that was created by the Emergency Economic Stabilization Act [EESA], 12 U.S.C. § 5201 et seq. See HAMP Handbook 1.0 for Non- GSE Servicers, effective August 19, 2010 at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook 10.pdf(last visited February 25, 2015).

regret to inform you that your request has been denied for the following reason(s): ... Our records indicate that foreclosure sale held/will be held." R. App. 143-144. At this point, the Regos were desperately attempting to save their home and exploring all options, including applying for a reverse mortgage. R. App. 141. The foreclosure auction took place on May 27, 2011. R. App. 68.

On April 24, 2012, Caleb Sherub, an Orlans Moran employee purporting to be an attorney-in-fact for GMAC, signed an Affidavit of Sale stating that he had mailed the Notice of Sale to the Regos and that he had caused the notice to be published in the Billerica Minuteman. R. App. 65. On April 26, 2012, GMAC executed a foreclosure deed in favor of Fannie Mae. R. App. 64.

On April 26, 2012, GMAC executed a Certificate of Authorization empowering Orlans Moran to perform certain foreclosure related activities. R. App. 234. This occurred almost a year after the sending and publishing of the Notices of Sale, almost eleven months after the foreclosure auction, and even after the signing of the Affidavit of Sale. Furthermore, the Certificate did not authorize Orlans Moran to mail or publish the notice of sale, but rather only appointed the law firm "**to make** open, peaceable and unopposed entry upon the mortgaged

property." R. App. 234. The Certificate purported to ratify the execution of "necessary affidavits in conjunction with said foreclosure" and "any and all actions taken by Orlans Moran PLLC, pursuant to said purposes." R. App. 234.

Although the notices of the sale were prepared, sent, and published by a party without authorization, Fannie Mae brought a summary process action that alleged the Regos occupied their home unlawfully and that they owed Fannie Mae compensation for "use and occupancy." R. App. 9. In their answer, the Regos alleged that the foreclosure sale was void, that Fannie Mae did not have a superior right to possession, and that the foreclosure was conducted in violation of G.L. c. 93A. R. App. 11-14. eased on this defense, the foreclosure sale on May 27, 2011 should have been voided. And based on the G.L. c. 93A counterclaims, the Regos should have been awarded damages.

Summary of the Argument

A foreclosure is void if not exercised by an authorized party and in strict compliance with the power of sale. Prior to foreclosure, the mortgagor must be provided notice of the sale, and notice of the sale must be published in an appropriate newspaper. (11-13) The mortgagee may authorize its attorney to provide this

notice, but pursuant to a 1906 amendment to state statute, the authorization must be provided in writing under seal, and must be given before the attorney sends the notice of sale. (13-17) If the foreclosure is not conducted in strict compliance with the statutory power of sale, specifically with G.L. c. 244, § 14, it is void. (18-22) In this case, the mortgagee, GMAC, failed to authorize its attorney, Orlans Moran, in writing, and therefore the foreclosure sale of the Regos' home was void. (11-31)

Additionally, in this case the Plaintiff Fannie Mae failed to establish its prima facie case. A summary process plaintiff in a post-foreclosure case may establish its prima facie case by providing the Foreclosure Deed and an Affidavit of Sale that complies with one of the statutory forms. However, if the Affidavit of Sale does not comply with one of the statutory forms, it is facially defective, and the plaintiff must provide extrinsic evidence to establish it strictly complied with the power of sale. In this case, Fannie Mae's Affidavit of Sale was facially defective, and the extrinsic evidence was not based on personal knowledge of the actions of the mortgagee, and moreover it clearly establishes that the power of sale was not strictly complied with as the mortgagee's law firm mailed and published the notice of

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sale when it was not authorized. (31-35)

Finally, the Housing Court erred in dismissing the Defendant Regos counterclaims under c. 93A as they fall within the general jurisdiction of the Housing Court (35-41), and requiring the the Regos to file an affirmative suit in another court regarding claims directly related to the foreclosure of their home is inefficient and unduly burdensome. (41-45)

Argument

I. The foreclosure of the Regos' home is void, because the Orlans Moran law firm was not authorized to prepare, mail, and publish the notices of sale as required by G.L. c. 244 § 14.

In Massachusetts, a foreclosure is void if not exercised by an authorized party and in strict compliance with the power of sale. U.S. Bank, N.A. v. Ibanez, 458 Mass. 637, pAc 647 ronill

„u-„ Prior to foreclosure, the mortgagor must be provided notice of the sale, and notice of the sale must be published in an appropriate newspaper. G.L. c. 244 § 14. Section 14, which is part of the Statutory Power of Sale, G.L. c. 183 § 21, expressly lists and limits which parties may send notice to a mortgagor of an upcoming foreclosure sale. Under this statute, if the mortgagee does not take the statutorily required steps itself, it can have an attorney take these steps, including

sending a notice of sale to the mortgagor and publishing a notice in a newspaper, but only after the attorney has been "duly authorized by a writing under seal." Id. Prior to 1906, a mortgagee was not required to give its attorney written authorization to perform these acts. However, in 1906 the Legislature amended the predecessor to G.L. c. 244 § 14, by inserting the requirement that a mortgagee authorize its attorney in writing. St. 1906, c. 219, § 1.[2]

Since any attempt to foreclose by an unauthorized party is void, if the attorney sends notices required by statute to a mortgagor prior to receiving written authorization, these notices are void, and the subsequent attempt to foreclose is void. In this case, the law firm had no written authorization to send the Regos notice of foreclosure or publish the notice of sale. Therefore, it failed to conduct the foreclosure in strict compliance with the statutory power of sale. As a result, the foreclosure sale of the Appellants' home is void, the Appellee does not have a superior right to possession of the Appellants' home, and the housing court erred in

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[2] R.L. 187, § 14 is the predecessor to G.L. c. 244 § 14. When the Revised Laws were recodified as the General Laws, this language was moved unchanged to G.L. c. 244 § 14, where it remains to this day.

granting the Plaintiff-Appellee's motion for summary judgment.

A. Under G.L. c. 244 § 14, a mortgagee cannot orally authorize an attorney, but rather must do so by a writing.

The history of G.L. c. 244, § 14 demonstrates the Legislature's clear intent that a mortgagee must authorize a foreclosing attorney in writing under seal before the attorney conducts foreclosure activities. Prior to 1906, the statute did not require that an attorney be authorized in writing. The Legislature specifically added this requirement by a 1906 amendment. St. 1906, c. 219, § 1.

The statutory amendment appears to be a response to the SJC's decision in Cranston v. Crane, 97 Mass. 459 (1867). In Cranston, the husband of the mortgagee represented her at the foreclosure sale with only verbal authorization from the mortgagee. Id. at 461-2. The Cranston Court held that "the giving of notices, the entry, and the conduct of the auction were all matters which the mortgagee might properly employ others to attend to; no authority under seal was required for these purposes." Id. at 464.

However, as noted, following Cranston, the Legislature amended the statute and added a requirement that any attorney undertaking acts to foreclose must be

authorized in writing. The 1906 Amendment provides in relevant part that:

> The mortgagee or a person who has his estate in the land mortgaged or a person authorized by the power of sale, or the attorney duly authorized by a writing under seal, or the legal guardian or conservator of such mortgagee or person, may, upon a breach of the condition and without action brought, do all the acts authorized or required by the power.

R.L. 187, §14, St. 1906, c. 219, § 1 (Approved March 31, 1906) (emphasis added). Since the Legislature amended the statute subsequent to Cranston, "It can be assumed that new legislation alters existing law." Morrison v. Lennett, 415 Mass. 857, 863 (1993). The current language, unchanged since the 1906 Amendment,

requires that any attorney taking the statutory steps to foreclose be authorized by the mortgagee in writing. G.L. c. 244 § 14. "It must be presumed that the Legislature intended to accomplish something substantial by the enactment of the later statute." Boston & Maine R.R. v. Hartford Fire Ins. Co., 252 Mass. 432, 435 (1925). Thus, this Court must give full effect to that amendment. Accordingly, Cranston, having been decided before the amendment (when the statutory language was materially different than it is now) is no longer good law, and does not control this case.

Appellants anticipate that Fannie Mae will argue, as it did in the lower court, that § 14's written authorization requirement only applies when a mortgagee's attorney is foreclosing in his or her own name. R. App. 305. However, Fannie Mae misinterprets § 14. In this case, the plain language of the statute is unambiguous. Section 14 does not specify that only an attorney foreclosing in his own name must receive written authorization. It is a foundational rule of statutory interpretation that:

> "[A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated."

Rodman v. Rodman, 470 Mass. 539, 541 (2015). Fannie Mae seeks to insert words into the statute that simply are not there.

In addition, Fannie Mae's interpretation of § 14 is absurd, as it renders this term of the statute entirely meaningless since no attorney would ever foreclose on a mortgage in his own name rather than his client's. Fannie Mae, by arguing that the statute only applies to attorneys foreclosing in their own name, would be asking this Court

to determine that this statute only applies to a situation that never happens. Foreclosure attorneys never foreclose in their own name. Because a mortgagee's attorney has no ownership interest in the mortgaged property, no bidder would purchase a home at a foreclosure auction from a seller with no ownership interest in, or title to, the property. "[R]ules of statutory construction require courts to ... 'avoid absurd results.' Connors v. Annino, 460 Mass. 790, 796 (2011), quoting Canton v. Commissioner of the Mass. Highway Dep't, 455 Mass. 783, 792 (2010). It cannot be that the Legislature could have included this language with the intention that it never apply. The "intention to enact barren, ineffective provision [is) not lightly imputed to Legislature." Matulewicz v. Planning Bd. of Norfolk, 438 Mass. 37, 44 (2002), citing Insurance Rating Bd. v. Commissioner of Ins., 356 Mass. 184, 189 (1969).

While Fannie Mae's reading of the statute leads to an absurd result, applying the plain language of G.L. c. 244 § 14 as it is written does not. "Courts must follow the plain language of a statute when it is unambiguous and when its application would not lead to an absurd result, or contravene the Legislature's clear intent." Commonwealth v. Kelly, ___ Mass. ___, 2014 WL 7893162

(2014) (internal quotes omitted) (emphasis added). The Legislature clearly intended that its amendment would have an effect, yet Fannie Mae seeks to either entirely ignore the 1906 amendment, or read the statute in a bizarre manner to render it meaningless.

Moreover, mere verbal authorization is not permitted for any of the other types of statutorily authorized entities under the post-1906 language of G.L. c. 244, § 14. In addition to an attorney duly authorized by a writing, § 14 identifies three other types of entities empowered to act. Each of the other entities is also able to demonstrate its authority to undertake the required actions in writing. Whether someone is the 1), "mortgagee or person having estate in the land mortgaged," 2) "a person authorized by the power of sale" or 3) "legal guardian or conservator of such mortgagee or person", that party would have some written proof of its authority to act. Logically, the legislature extended the writing requirement to attorneys undertaking acts necessary to foreclosure, in an effort to avoid the type of situation presented in Cranston where an individual foreclosed without written proof of authorization.

B. A foreclosure is void if not conducted by the proper party and in strict compliance with the power of sale.

Massachusetts case law, for more than 150 years, has consistently held that a foreclosure sale is void unless (i) it is conducted by an authorized party, Ibanez, 458 Mass. at 646-647, and (ii) it is conducted in strict compliance with the power of sale. Moore v. Dick, 187 Mass. 207 (1905). Furthermore, recently in U.S. Bank, N.A. v. Schumacher, the SJC reiterated that:

> Where a defendant in the summary process action claims that the mortgage holder failed strictly to adhere to the requirements under the statutory power of sale set forth in G. L. c. 183, § 21, and the related requirements in G. L. c. 244, §§ 11-17C, proof of any violation of these requirements will void the foreclosure sale and, therefore, defeat the eviction.

467 Mass. 421, 432 (2014) (Gants, J., concurring) (emphasis added).[3]

In Ibanez, the Supreme Judicial Court held that when a foreclosing party failed to establish it had authority to foreclose, the foreclosure sale was void. Ibanez, at 655. In holding so, the SJC stated that "One of the terms of the power of sale that must be strictly adhered to is

[3] In Schumacher, the majority adopted Chief Justice Gants's concurrence, noting that "The concurring opinion of Justice Gants accurately reflects the practical consequences of our decision today." Schumacher, at note 12.

the restriction on who is entitled to foreclose." Id. at 647. The SJC looked to G.L. c. 244 § 14 to determine exactly which parties are entitled to foreclose. Section 14 provides, in relevant part, that:

> [1] The mortgagee or person having his estate in the land mortgaged, or [2] a person authorized by the power of sale, or [3] the attorney duly authorized by a writing under seal, or [4] the legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee or person may, upon breach of condition and without action, perform all acts authorized or required by the power of sale[.]

G.L. c. 244, § 14 (emphasis added). In Ibanez, the SJC held that only a party listed in § 14 "is empowered to exercise the statutory power of sale." Ibanez, at 647. It added: "Any effort to foreclose by a party lacking `jurisdiction and authority' to carry out a foreclosure under these statutes is void." Id. quoting Chace v. Morse, 189 Mass. 559, 561 (1905), citing Moore, supra.

The SJC emphasized that the statutory authority to foreclose is intertwined with the requirement to provide notice: "A related statutory requirement that must be strictly adhered to in a foreclosure by power of sale is the notice requirement articulated in G. L. c. 244, § 14." Id. The court cited Moore, 187 Mass. at 212, for the proposition that "The manner in which the notice of the proposed sale shall be given is one of the important terms

of the power, and a strict compliance with it is essential to the valid exercise of the power."

In this case, there can be no dispute that it was the law firm, rather than the mortgagee, that took steps to provide the Appellants notice of foreclosure sale. Fannie Mae itself made that clear in the two affidavits it provided in support of its motion for summary judgment. The first affidavit is the statutory Affidavit of Sale signed by Caleb J. Sherub of Orlans Moran ("Sherub Affidavit of Sale"). Following a foreclosure, the foreclosing entity must file an Affidavit of Sale in the registry of deeds along with the foreclosure deed pursuant to G.L. c. 244, § 15. The Sherub Affidavit of Sale states that Orlans Moran - not GMAC - undertook to perform all acts in accordance with the notice provisions of § 14. The Sherub Affidavit of Sale specifically states that:

> "I, Caleb J. Sherub _ caused to be published on the 5th day of May, 2011, on the 12th day of May, 2011 and on the 19th day of May, 2011, in the Billerica Minuteman_ a copy of [the mortgagee's notice of sale of real estate]".
>
> "I have also complied with Chapter 244, Section 14 of Massachusetts General Laws, as amended, by mailing the required notices, by certified mail."

R. App. 65. The Sherub Affidavit of Sale was signed by Caleb Sherub as "Employee, Authorized Signatory, Real Property of Orlans Moran, PLLC, attorney-in-fact for GMAC

Mortgage, LLC."

The second affidavit Fannie Mae relies on is signed by Paul J. Mulligan of Orlans Moran ("Mulligan Affidavit" R. App. 43-46). Fannie Mae provided this affidavit in support of its motion for summary judgment under Mass.R.Civ.P. 56(e). This affidavit, like the Sherub Affidavit of Sale, states that Orlans Moran - not GMAC - undertook all steps to satisfy the notice provisions of §14. The Mulligan Affidavit specifically states that:

> "Orlans Moran sent, via First Class and Certified Mail, Notices of Intention to Foreclose."
>
> "Orlans Moran published a Notice of Foreclosure Sale."
>
> "Caleb Shureb_ executed an Affidavit of Sale."

R. App. 41-42. Under § 14, an attorney is only permitted to exercise the power of sale after receiving written authorization. 1[illegible]P., it is undisputed that Orlans Moran - not GMAC - sent the notice of sale to the Appellants on May 4, 2011. And it is undisputed that Orlans Moran - not GMAC - published the notice of sale in the newspaper in May 2011. However, it is also undisputed that GMAC did not provide Orlans Moran written authorization to prepare, mail, and publish the notice of sale pursuant to § 14. Furthermore, it is undisputed that GMAC did not provide Orlans Moran written authorization to perform any actions

at all until April 26, 2012 - almost a year after the foreclosure auction. Simply put, the law firm was not authorized by a writing, an explicit requirement of § 14, to exercise the power of sale.

Ibanez makes it clear that sending the notice of intent to foreclose is an integral part of the foreclosure process and that the notices may only be sent by an entity authorized by § 14. Ibanez, at 647-648. In Ibanez, because the notices were sent before the foreclosing entities were assigned the mortgage, the foreclosing entities were not authorized under § 14 and therefore the foreclosures were void. Id. at 655. Similarly, in this case, the notices of sale were sent by a party not authorized under § 14 and the foreclosure sale is equally void.

C. The law firm, not the mortgagee, mailed and published the notice of foreclosure sale of the Appellants home.

Fannie Mae relied below on Fairhaven Savings Bank v. Callahan, 391 Mass. 1011, 1012 (1984), to support its argument that advance written authorization was not required for attorneys taking the steps of preparing, mailing, and publishing the notices of sale statutorily required by G.L. c. 244, § 14. But Fairhaven is of no assistance to Fannie Mae because the facts in Fairhaven

were the exact reverse of the facts here.

In Fairhaven, the Affidavit of Sale was executed by the mortgagee, the President of Fairhaven Savings Bank, not by the attorney. The President of the Bank personally made oath that "I published" and "I mailed" the notices, and "I sold the mortgaged premises." (A copy of this document is included in the Addendum to this Brief). The SJC explained:

> We accept the judge's determination that the plaintiff-mortgagee conducted the foreclosure, with its lawyers merely assisting in the preparation of legal documents.

391 Mass. at 1012. And in Fairhaven, there was advance written authorization to the lawyers to assist' in the preparation of legal documents. The mortgagor's objection was simply that this written authorization was not under seal. No wondcr that the SJC thought that the argument that this document "must be under seal in order for the foreclosure conducted pursuant to G. L. c. 244, Section 14, to be valid comes perilously close to being frivolous." Id.

By contrast, the Affidavit of Sale in the present case was executed by Attorney Sherub, not by the mortgagee itself. And that Affidavit as well as the affidavit by Attorney Mulligan both clearly demonstrate that the law

firm, and not the mortgagee, undertook all efforts to comply with G.L. c. 244 § 14 by mailing and publishing the notice of foreclosure sale. Fannie Mae thus cannot claim that the mortgagee did the foreclosure itself, with a law firm "merely assisting in the preparation of legal documents." The Sherub and Mulligan Affidavits show that the law firm crossed the line from "merely assisting in the preparation of legal documents" to actually "conduct[ing] the foreclosure," and at that point, the statutory written authorization was required. Moreover, it is undisputed that - unlike the Fairhaven case - all of this work was done by the law firm without any written authorization. The Regos' complaint is not the mere absence of a seal, but the complete absence of any written authorization whatsoever, with or without a seal.[4]

The SJC in Fairhaven, while it affirmed the judgment of the Appellate Division, 1983 Mass. App. Div. 179, did not adopt the Appellate Division's reasoning. The Appellate Division had based its analysis on Cranston v. Crane, supra, and completely ignored the fact that the language requiring written authorization for an attorney

[4] Ironically, when GMAC finally did get around to giving the Orlans Moran law firm written authorization to make entry and bid on the property, almost a year after the foreclosure sale, it in fact did so under seal. R. App. 234

to foreclose on behalf of the mortgagee had been added after the decision in Cranston. 1983 Mass. App. Div. at 181. But as explained in Subsection A above, because of the post-Cranston amendment, Cranston is no longer good law.[5]

The Appellate Division recently reaffirmed its Fairhaven reasoning in Federal National Mortgage Association v. Isaac, 2014 Mass. App. Div. 223. But the Appellate Division once again based it analysis on Cranston, supra, as well as on its own decision in Fairhaven, and once again completely ignored the fact that the language requiring written authorization for an attorney to foreclose on behalf of the mortgagee had been added after the decision in Cranston. 2014 Mass. App. Div. at 224. The Isaac decision did not acknowledge that the SJC's decision in Fairhaven was expressly based on the specific facts of that case and did not stand for the proposition that no advance written authorization was ever

[5] The Appellate Division noted that, pursuant to G.L. c. 183, § 1A, the lack of a seal no longer voids an interest in land, but in reliance on Cranston, it did not determine the significance of the absence of a seal. The SJC, on the other hand, placed no reliance on Cranston, and instead focused on the facts that (a) it was the mortgagee itself, and not the lawyers, who conducted the foreclosure, and (b) that there was advance written authorization to the law firm, and it was only the absence of a seal to which the mortgagor objected. 391 Mass. at 1012.

required when an attorney (rather than the mortgagee itself) conducted the foreclosure.

It is the SJC's decision in Fairhaven - not the decisions of the Appellate Division that improperly rely on Cranston and ignore the 1906 amendment to the statute - that establish when the attorney's actions comport with G.L. c. 244, § 14. And when the Affidavit of Sale shows, as it does here, that the law firm, not the mortgagee itself, conducted the foreclosure, a written authorization is required by G.L. c. 244 § 14.

D. The Certificate of Authorization did not empower the law firm to mail or publish the Notice of Sale.

The limited scope of the Certificate of Authorization executed by the mortgagee, R. App. 234, did not authorize the statutorily necessary acts taken by Orlans Moran during the foreclosure proceedings. The Certificate executed by the mortgagee on April 26, 2012, "specifically authorized" the law firm to "make open, peaceable and unopposed entry upon the mortgaged property" and "further ratifies that Orlans Moran PLLC, was specifically authorized by the Mortgagee to bid on its behalf at the foreclosure auction ... and execute necessary affidavits in conjunction with said foreclosure." Id. Notably absent from the Certificate is language authorizing Orlans Moran

to publish and mail the notice of sale, as required by G.L. c. 244, § 14. Thus the mortgagee has yet to give Orlans Moran the requisite authority to carry out critical statutorily-required steps in the foreclosure proceeding. Orlans Moran did not have the authority to publish and mail the notices of sale prior to foreclosure, and it still does not have the authority to do so as of this date.

E. Under US Bank v. Ibanez, a mortgagee cannot ratify a void act.

Even assuming, arguendo, that the Certificate was not limited in its scope, it was not issued until after the foreclosure sale and purports to retroactively ratify a void act. A principal may only ratify an act that he could have authorized at the time it took place, and not an act that was void at the time it occurred. See United States v. Grossmayer, 76 U.S. 72, 75 (11:1) ("It is argued that the purchase by Einstein was ratified by Grossmayer, and that being so the case is relieved of difficulty; but this is a mistaken view of the principle of ratification, for a transaction originally unlawful cannot be made any better by being ratified") (emphasis added) .[6]

6 The unlawful acts referred to in Grossmayer were commercial purchase orders with the enemy during the Civil War. The agent was authorized only after business dealings with seceding states had been prohibited, so the acts were

In Ibanez, the SJC addressed the issue of retroactive ratification of authority to foreclose. 458 Mass. at 653-654. Specifically, the Court confronted the question of whether a mortgagee could retroactively ratify a void assignment to make an entity a proper party under G.L. c. 244 § 14, even though it had not been a proper party at the time of the foreclosure sale. Id. The Court held that, "Where there is no prior valid assignment, a subsequent assignment by the mortgage holder to the note holder is not a confirmatory assignment because there is no earlier written assignment to confirm." Ibanez, 458 Mass. at 654. As a result, the Court concluded that, "If the plaintiffs did not have their assignments to the Ibanez and LaRace mortgages at the time of the publication of the notices and the sales, they lacked authority to foreclose under G. L. c. 183, § 21, and G. L. c. 244, § 14." Id. at 653.[7] Similarly, in this case, Fannie Mae cannot

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unlawful when they occurred and could not later be ratified. Grossmayer, at 75.

In Figueroa v. Bank of America, 2012 WL 5921043 *3 (D. Mass., Zobel, J.) the United States District Court of Massachusetts applied this reasoning from Ibanez to the "attorney duly authorized by a writing" requirement of c. 244, § 14, holding that if the only authorization was a post-sale certificate of appointment, "the foreclosure sale was conducted in violation of Mass. Gen. Laws c. 244, § 14, because the person conducting the sale was not a properly authorized agent of the mortgagee." Subsequently, Fannie Mae provided proof of authorization

retroactively authorize Orlans Moran to mail and publish the notice of sale under § 14, as Orlans Moran was not authorized at the time of mailing or publication, and therefore the notice of sale was void.

Ratification can validate unauthorized acts that are voidable, but not those that were unlawful, void, or had no legal effect at the time they were conducted. A "voidable" act is distinct from a "void" act. "Voidable" is defined as "[v]alid until annulled; capable of being affirmed or rejected at the option of one of the parties..." Black's Law Dictionary (9th ed. 2009) (emphasis added). A "void" act is defined as "[o]f no legal effect; null." Id. "The distinction between void and voidable is often of great practical importance. Whenever technical accuracy is required, void can be properly applied only to those provisions that are of no effect whatsoever — those that are an absolute nullity." Id. (emphasis in original).

Massachusetts recognizes the distinction between void and voidable in the conveyance of property interest.

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at the time of the foreclosure sale, and the case was dismissed, sub nom, Figueroa v. Federal Nat. Mortg. Ass'n, 2013 WL 3713759 (D.Mass. 2013). However, in the present case, summary judgment for Fannie Mae can only be upheld on the summary judgment record below, and there is no evidence of written authorization other than the post-sale Certificate of Authorization.

See Chace, 189 Mass. at 562 ("We are therefore brought to the question whether the irregularity in the notice and sale made the sale void, or only voidable"). The word "void" is used specifically by the SJC to describe foreclosures that are not compliant with the power of sale, including specifically G.L. c. 244 , § 14. See Ibanez, 458 Mass. at 646 ("'[O]ne who sells under a power [of sale] must follow strictly its terms. If he fails to do so there is no valid execution of the power, and the sale is wholly void.'") (emphasis added); See also Id. at 647 ("Any effort to foreclose by a party lacking 'jurisdiction and authority' to carry out a foreclosure under these statutes is void." (emphasis added)); Id. at 648 ("[W]here a certain notice is prescribed, a sale without any notice, or upon a notice lacking the essential requirements of the written power, would be void as a proceeding for foreclosure." (emphasis added)). Further, the SJC has held that a conveyance of property interests following void acts or instruments is invalid. See, e.g. Moore, 187 Mass. at 212 ("It follows that the sale was not valid. The case stands as though there had been no attempt to foreclose, and the right of redemption is still outstanding"); See also Ibanez, 458 Mass. at 655.

A retroactive Certificate of Authorization executed

post-foreclosure cannot thus ratify the previously unauthorized and void actions taken by a foreclosing law firm. Orlans Moran did not have authorization in writing to foreclose on Plaintiff's behalf until well after the foreclosure sale. Orlans Moran did not have the "jurisdiction and authority" to foreclose, as required under G.L. c. 244, § 14, and therefore the foreclosure is void. An after-the-fact ratification cannot ratify a foreclosure that was void.

II. **This court erred in granting Plaintiff's Motion for Summary Judgment, as Fannie Mae relied on a facially defective affidavit, and has therefore failed to establish its prima facie case.**

"[I]n a summary process action a foreclosure deed and statutory form [Affidavit of Sale] constitute prima facie evidence of the right of possession." Federal National Mortgage Association v. Hendricks, 463 Mass. 635, 642 (2012). The two statutory bases for Affidavits of Sale are G.L. c. 244, § 15, and G.L. c. 183, § 8 (authorizing the so-called "Statutory Form" in G.L. c. 183 Appendix 12, as added by St. 1912, c. 502, § 12). But Hendricks did not say that any Affidavit of Sale is sufficient for this purpose. To the contrary, the Hendricks Court explained that where a challenge to the plaintiff's title "is focused on an affidavit of sale that is defective on its face, a

defendant needs no other evidence to proceed with his challenge." 463 Mass. at 642. It is only "where the affidavit of sale is in the statutory form or meets the particular requirements of § 15, [that] a plaintiff has made a prima facie case." (Emphasis added). In a case where an affidavit is neither "in the statutory form" nor "meets the particular requirements of § 15," the Plaintiff cannot "resort to [the) affidavit but would be obligated to provide extrinsic evidence to show power of sale was exercised properly." Id, citing O'Meara v. Gleason, 246 Mass. 136, 139 (1923).

Under G.L. c. 244 § 15, an attorney may sign and record an Affidavit of Sale only if the attorney is "duly authorized by a writing." Yet GMAC not only failed to provide written authorization to the Orlans Moran law firm before the foreclosure, it also did not do so before the law firm had executed the Affidavit of Sale. R. App. 65. Therefore, the law firm was not authorized under § 15 to execute the Affidavit of Sale, and consequently it is facially defective and cannot make out Fannie Mae's prima facie case.

Under Hendricks and Deutsche Bank Nat'l Trust Co. v. Gabriel, 81 Mass. App. Ct. 564 (2012), a foreclosing mortgagee may use the shorter Statutory Form Affidavit of

Sale authorized by Appendix 12 of G.L. c. 183 "as an alternative to the more lengthy form prescribed by G. L. c. 244, § 15." Hendricks, 463 Mass. at 641. However, as the Appellate Division emphasized in HSBC Bank USA, N.A. v. Galebach:

> The statutory model form for a foreclosure affidavit set out as Form 12 of the Appendix to G.L. c. 183 reflects [the] requirement of an affiant describing his or her acts in the first person.

2012 Mass. App. Div. 155, 160. Unlike "the more lengthy form prescribed by G. L. c. 244, § 15," Hendricks, 463 Mass. at 641, the c. 183 Statutory Form does not permit the affiant to describe the acts of others. Yet Sherub avers that the Lender, rather than he himself, sold the mortgage premises. R. App. 65. Sherub also avers that he, as the signatory, was "named in the foregoing deed," which is manifestly not Life case, as he not a party to the foreclosure deed. R. App. 64. And although the Statutory Form requires that it be "sworn to by the said [affiant]" so that it is clear upon its face that the affiant is personally verifying that such acts were done, Shureb merely affirmed that the Affidavit was true "to the

best of their knowledge and belief."[8]

As a result, Fannie Mae must rely on extrinsic evidence to establish its prima facie case. Fannie Mae only introduced one piece of extrinsic evidence, the Mulligan Affidavit. R. App. 40-43. But the Mulligan Affidavit did not comply with Mass. R. Civ. P. 56(e). It was based on records rather than the affiant's "personal knowledge," and did not "show affirmatively that the affiant is competent to testify to the matters stated therein." It also was not accompanied by "Sworn or certified copies of all papers or parts thereof referred to in [the] affidavit." For example, it contained a lengthy discussion about GMAC's conduct of the foreclosure sale, including details about "three separate third party bidders who entered bids higher than GMAC's bid," but says that "none of the higher bidders completed the purchase of the Property." R. App. 41, 1 8. But neither personal knowledge nor documents supported these assertions regarding GMAC's actions. In short, Fannie Mae has not made its prima facie case with either statutory form

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8 It is well-settled that "[a]ll affidavits or portions thereof made on information and belief, as opposed to personal knowledge, are to be disregarded." Shapiro Equip. Corp. v. Morris & Son Constr. Corp., 369 Mass. 968 (1976), citing Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827, 831 (1950).

affidavits or extrinsic evidence.

Moreover, the Regos anticipate that Fannie Mae will argue that this case is factually similar to Fairhaven, supra, with the mortgagee conducting the foreclosure and the law firm "merely assisting" the mortgagee in the preparation of legal documents. But that is not what the affidavits say.

What they say is that the Orlans Moran law firm took all the steps to send and publish the statutorily required notices. If those affidavits are true, then it was Orlans Moran that conducted the foreclosure, rather than merely assisting mortgagee GMAC to do so. Conversely, if GMAC was the one that conducted the foreclosure, with Orlans Moran merely assisting, then the affidavits are not true and could not make out Fannie Mae's prima facie case.

Fannie Mae cannot have it both ways: it cannot argue that GMAC undertook the acts required under G.L. c. 244 §14 to exercise the power of sale, and simultaneously rely on affidavits of its attorneys stating otherwise to establish its prima facie case.

III. The Housing Court has jurisdiction to hear the Regos' counterclaims.

The Housing Court has general jurisdiction over "civil actions arising ... under the provisions of common

law and equity concerned directly or indirectly with the possession, condition, or use of any particular housing accommodations." G.L. c. 185C, § 3. A defendant in a post-foreclosure case may bring a counterclaim seeking money damages or equitable remedies (i.e. the rescission of the foreclosure sale) or both. See Bank of America, N.A. v. Rosa, 466 Mass. 613, 626 (2013). Even before Rosa, this court had held that in a post-foreclosure summary process action, the Housing Court's jurisdiction over housing matters pursuant to G.L. c. 185C, § 3 "encompassed the original summary process action, as well as the counterclaims." Duggan v. Gonsalves, 65 Mass. App. 250, 254, n. 6 (2005) (emphasis added).

Here, the Regos brought counterclaims under c. 93A seeking damages, costs, and attorneys fees, based on GMAC having charged them multiple late fees in violation of the terms of the mortgage note (R. App. 143-144), GMAC having sent them deceptive notices in the days leading up to foreclosure (R. App. 236-237), and the foreclosure being void (for the reasons stated in Section I) and therefore the summary process action itself being improper (R. App.

12-13).[9]

In its motion to dismiss, Fannie Mae argued that any post-foreclosure counterclaim must go to possession, and since the court already ordered that Fannie Mae was entitled to possession, the court must therefore dismiss the Regos' counterclaim. R. App. 319.

However, Fannie Mae is simply incorrect in stating that under Rosa, 466 Mass. at 625-626, every post-foreclosure counterclaim must go to possession. The Housing Court had jurisdiction over the Regos' c. 93A counterclaims under G.L. c. 185C, § 3, which grants to the Housing Court jurisdiction over "civil actions . . . under . . . so much of [G. L. c. 93A] . . . as is concerned directly or indirectly with the health, safety, or welfare, of any occupant of any place used, or intended for use, as a place of human habitation and the possession [thereof]," Rosa, 466 Mass. at 625. The Rosa Court did not limit the scope

9 In the present posture of this case, it is immaterial that some of these actions were taken by GMAC before the property was assigned to Plaintiff Fannie Mae. As the SJC explained in Drakopoulos v. U.S. Bank Nat . Ass' n, 465 Mass. 775, 787, n. 16 (2013), "as a matter of common law, assignees are not shielded from liability under G. L. c. 93A by virtue of their assignee status." Whether Fannie Mae is liable for all GMAC's conduct depends on the degree of its own culpability, but on this record it certainly cannot be said that Fannie Mae has no liability for GMAC's actions. And in any case, Fannie Mae is certainly liable for its own unfair and deceptive acts.

of such summary process counterclaims available to post-foreclosure defendants. Rather, the Court held that summary process counterclaims were not limited to those allowed under G.L. c. 239 § 8A (the so-called "rent withholding law"): "The plain language of § 8A does not suggest a limitation on affirmative defenses and counterclaims in all summary process actions." 466 Mass. at 619. The Rosa Court noted that "in Boston Hous. Auth. v. Hemingway, [363 Mass. 184] at 199-203, this court held that defenses and counterclaims under common law for breach of the implied warranty of habitability were available to a tenant in a summary process action apart from any defenses and counterclaims available under § 8A." 466 Mass. at 620. (emphasis added).

Since G.L. c. 239 § 8A does not limit the counterclaims available to homeowners in post-foreclosure summary process actions, the Rosa Court expressly held that the Housing Court has jurisdiction over the exact type of counterclaim the Regos advance in this case: c. 93A damage claims in a post-foreclosure summary process action based on unfair and deceptive acts (including improper foreclosure). 466 Mass. at 616. And contrary to Fannie Mae's argument, there is no requirement that they be tied to equitable claims that challenge the plaintiff's title:

"Counterclaims in a postforeclosure summary process action are not limited to equitable claims." 466 Mass. at 625.

This is consistent with the Uniform Summary Process Rules, which acknowledge both counterclaims which the court may not sever from the summary process case, and counterclaims which the court may sever and assign to the civil docket. The official Commentary to Rule 5 explains that, "Because counterclaims are not compulsory, the court retains discretion to sever a counterclaim which cannot appropriately be heard as part of a summary process action." A counterclaim that goes to possession is by definition not severable.[10] However, by Fannie Mae's reasoning, the Housing Court would never be able to sever a counterclaim in a post-foreclosure summary process case, as the court would only have jurisdiction over non-severable counterclaims going to title. This conclusion would render superfluous the language of Rule 5 and its official Commentary regarding severable counterclaims. This Court must reject Fannie Mae's

10 Uniform Summary Process Rule 5 itself gives as its example of a non-severable counterclaim one that is being used as a defense under G.L. c, 239, § 8A. But after Rosa, it is clear that there are other counterclaims that go to possession, and those are similarly non-severable.

argument, *which* would render part of Rule 5 redundant."

In addition, Fannie Mae' s argument (which the Housing Court accepted) requires the Housing Court to make a decision on the merits of the case as a threshold jurisdictional matter. In this case, because of the unusual procedural history, the Housing Court had already made a decision as to possession when Fannie Mae filed its motion to dismiss the Regos' counterclaim. Normally, if a challenge to a court's jurisdiction can be made at all, it should be made earlier in litigation, before the merits of the possession claim have been adjudicated. But under Fannie Mae's reasoning, the Housing Court may have to adjudicate a counterclaim (under c. 93A or otherwise) in order to determine whether the Court had jurisdiction to hear it. If it determines that the homeowner is entitled to damages but that the counterclaim does not challenge title, the Court must then (according to Fannie Mae) dismiss for lack of jurisdiction the damages portion of the counterclaim that it has just adjudicated in favor of the homeowners.

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11 A similar rule exists for interpreting statutes. See Bankers Life & Cas. Co. v. Commissioner of Ins., 427 Mass. 136, 140 (1998) (noting it is a "a basic tenet of statutory construction that a statute must be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous") (internal quotes omitted).

- Kattar v. Demoulas, 433 Mass. 1 (2000)

, illustrates this precise fact pattern. In Kattar, mortgagors brought a claim against a mortgagee under c. 93A asserting wrongful foreclosure of a golf course. Id. at 3. After trial, the Judge found that the mortgagee had violated c. 93A and that the mortgagors were entitled to damages, but not reconveyance of the property. Id. at 17. Under Fannie Mae' s reasoning, if Kattar had been a summary process case, the court would have been required to dismiss the mortgagor's successful c. 93A counterclaim after trial, as the court only awarded damages and not equitable relief, and therefore (according to Fannie Mae) would have been stripped of its jurisdiction.

Effectively, Fannie Mae is asking the Housing Court to decide summary process counterclaims on their merits in order to determine jurisdiction. This is an irrational result that is not supported by anything in either Rosa or G.L. c. 185C.

In addition, requiring homeowners to file a separate action is not only inefficient, but it is a substantial hardship and likely to result in injustice. Because Massachusetts is a non-judicial foreclosure state, issues regarding the validity of the foreclosure may not come before a court until the foreclosing banks, or their

successors, bring summary process cases to evict the homeowners. Those homeowners may have good claims that the foreclosure was void, or that the eviction was unfair or deceptive in violation of G.L. c. 93A. However, the ability of those homeowners to present their claims is hampered if they cannot litigate these issues in the summary process case, and must do so in a separate case, likely in another court.

The problem is particularly acute because the defendants in such cases are often self-represented or assisted by volunteer attorneys or Limited Assistance Representation programs. See Wells Fargo Bank v. Amero, 12-SP-0870, p.7 (Housing Court, August 13, 2012, Kerman, J.), affirmed by Rosa, supra, 466 Mass. at 614, n. 2. This should not come as a surprise, since a homeowner facing a post-foreclosure eviction is by definition highly unlikely to be able to afford to pay for legal representation. Dismissing a self-represented litigant's counterclaims, and forcing him to re-file the claims in an affirmative suit in a different court "is not only inefficient, it creates an obvious hardship and injustice." Id. at 7.

The inefficiencies are apparent. First, multiple cases must be filed, when the entire matter can easily be

adjudicated in a single case. Second, dismissing a counterclaim and requiring litigation in another proceeding, perhaps in another court, creates delay that is absent if the counterclaim is litigated in the summary process case. Third, a homeowner filing an affirmative claim under c.93A must send a demand letter 30 days prior to commencing suit. G.L. c. 93A, § 9(3).[12] Fourth, while a summary process counterclaim remains in a nearby state trial court, an affirmative case under c. 93A could be removed to federal court."

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[12] G.L. c. 93A, § 9(3) requires that, at least thirty days before commencing suit, the complainant must send a "demand letter" to the respondent, which "must identify the claimant and describe, reasonably, the unfair or deceptive act or practice and the injury caused thereby." Slaney v. Westwood Auto, Inc., 366 Mass. 688, 704 (1975). If the demand letter is not adequate, the claim will be dismisscd. Entrialgo v. Twin City Dodge, Inc., 368 Mass. 812 (1975). The primary purpose of the Chapter 93A demand letter is to encourage negotiation and settlement and thus avoid litigation entirely. See Spring v. Geriatric Authority of Holyoke, 394 Mass. 274 (1985). The Legislature recognized that this purpose does not exist when the other party has already commenced litigation, and Chapter 93A is being used as a counterclaim. It has thus provided: "The demand requirements of this paragraph shall not apply if the claim is asserted by way of counterclaim or cross-claim..." See Pella Windows, Inc. v. Burman, 2009 Mass. App. Div. 106 (Mass.App.Div. 2009). If homeowners must raise their Chapter 93A claims in a separate suit, the demand letter will be one more hurdle they must overcome, and the Legislature's intention of simplifying Chapter 93A counterclaims will have been defeated.

[13] Removal to federal court is not possible while the claim remains as a counterclaim. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 61 S. Ct. 868, 85 L. Ed. 1214 (1941);

This result would be contrary to the SJC's conclusion more than 40 years ago in Hemingway, supra, that counterclaims were available to defendants in residential summary process cases regardless of whether they provided a defense to a claim of possession. 363 Mass. at 203. It would be contrary to this court's own more recent conclusion in Duggan, supra, that the Housing Court's civil jurisdiction under G.L. c. 185C, § 3 "encompassed the original summary process action, as well as the counterclaims." 65 Mass. App. at 254, n. 6 (2005). It would be contrary to the concern expressed by the SJC in Bank of New York v. Bailey, that the pursuit of "speedy and inexpensive" summary process actions not be "compromised" by "unnecessary delay and inefficiency that the Legislature intended to eliminate when it reorganized the trial courts in the Commonwealth." 460 Mass. 327, 334 (2011). And it would be contrary to the "desirable considerations of judicial economy" that the Rosa Court itself emphasized when it ruled that counterclaims are available to homeowners like the Regos in post-foreclosure summary process actions.

It is in the interest of all concerned - the

Brae Asset Fund, L.P. v. Dion, 929 F. Supp. 29, 30 (D.Mass. 1996) .

homeowners, the banks, the courts, and the public - that the counterclaims be resolved simply and expeditiously in a single proceeding as part of the summary process case.

Conclusion

For the reasons stated above, Defendant-Appellants respectfully request this court to vacate the judgment, declare the foreclosure sale on May27, 2011 void, dismiss Plaintiff-Appellee's complaint, and remand to the Housing Court for further proceedings on Appellants' counterclaim under c. 93A. [14]

Respectfully Submitted,

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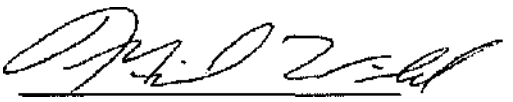
is Defendants hereby give notice that they intend to seek fees and costs related to the appeal in the event they prevail at the conclusion of the case. Brown v. F.L. Roberts, & Co., Inc., 452 Mass. 674, 689 (2008). T & D Video, Inc. v. Revere, 450 Mass. 107, 115 n. 21 (2007).

Certificate of Compliance
Pursuant to Mass. R. App. P. 16(k)

I hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); *Mass.* R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs) ; Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

February 26, 2015



Michael A. Weinhold

Certificate of Service

I hereby certify under the penalties of perjury that this day I served this Brief of Appellants Edward and Emanuela Rego on counsel of record for all other parties by first-class mail postage pre-paid.

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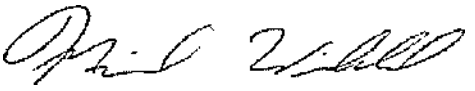
Boston, MA 02110

February 26, 2014



Michael A. Weinhold

ADDENDUM

St. 1906, c. 219, § 1

G.L. c. 183, § 21

G.L. c. 183, § 8

G.L. c. 183, Appendix Form 12

G.L. c. 185C, § 3

G.L. c. 244 § 14

G.L. c. 244, § 15

Mass.R.Civ.P. 56

Uniform Summary Process Rule 5

Wells Fargo Bank v. Amero, 12-SP-0870, (Housing Court, August 13, 2012, Kerman, J.)

Affidavit of Sale, Fairhaven Savings Bank v. Callahan, 391 Mass. 1011 (1984), affirming 1983 Mass. App. Div. 179 (Mass.App.Div. 1984)

railway company or companies for the purpose of his light or power for municipal use of the city, of its inhabitants, or for both purposes; and street rail.. way companies .inay maker contracts for flirnishing cicc t tricity' as aforesaid n..town, but the same shall not become operative unless the board of railroad commission.. ers shall, after a public hearing, approve the terms there(` as consistent with the public interests.

Approved allarch 31, 1906.

Chap.219. AN •

A.CT RELATIVE, TO PROCEDURE 11%7 TIM FORECLOSURE *0 3 "00JOES in SALE..

: 7 3 e i t e n a c t e d ;

amended.

511 SECTION 1. Section. fourteen of ehapter'.;.one hundred ri ad cialitv-seve4 of the ReViSea.Laws is:lierebTH'amendea by inSerting!after The :Woo: [4] §..ale in -the aeCondi:line, .the words: or: the .Attorney dilly .authorized: by. Arriving, 'tinder. Seal, ori the guardian: or .conservator Such mortgagee,l,or per.*ai ac6NY in time name.ofisitch rnottpliN or pci•son,j-, se as -to:irezte AS follows.:,:- *Section 14. .1.1i6* mortgagee. ore person who haShis..estatain the land mortgaged or a person Antliorixed br time. power ..of or tho attorney dui authorized under Seal, or. the legal guardihn or 7cOtisori*Of''Ciffsnchmortgag,ee or per Son acthigin the nai'iie. of sutli::inbrt a or :person, mad, `tipon a breach of condition and.*ithentaction brotight,: do' all the liet! R110101104 or reilitired hy the power.-;:- but: no sale under such power shall he effectual_ to:loreclose.

• Rights Of under power

a.. mom unless; prc viona. to. suck-sale, _notice ther',0 niS .been publiihed once in each of:three successive WCC the :first. publication to be not less :than t weittv-one before-Abe:day of a newspaper, if anv publishe in :the ettv7dt town in Whieh.itheTlandlics; otherwise, in a newSpaper published in such 'county:.

R. L. 187, § 15, amended.

SFCTif7T 2." Section fifteen of Said chapter one him limed :and eights-seven is. levels amended.-hy inserting Afict. the Word " 41 the first line, the words: or:the. attorney duly .ituthorized by :writing miter Setii., or legal 'guardian .ori cenServator of suelk perso n, insert= ing.after the .word "nets", in the. second line, the words ;' —or..01e nets of his principalieri-ward.,.-and bv striking, out the words " he has iii ..611 4e,spects- complied with the requirements of the poy,ok•.of.0ile and of the statute.'

in the seventh and eighth lines, and inserting in place thereof the words:— the rquirenteuts of the paWer of Sale and of the statute have in all respects been complied with, — so as to read as follows: —*Section* /5. The per Record of son selling, or the attorney duly authorized by, writitn' under seal, or the legal guardian or conservator • of such person. shall, within thirty days after the sale, cause a Copy of the notice and his affidavit stating his -acts, or the, acts of his principal or ward, fully and particularly to be recorded in the registry of deeds for the county or district in which the land lies, With t note of reference thereto on the margin of the record of the mortgage deed, if the mortgage is recorded in the same registry. Tf the affidavit shows that the requirements of the power of-sale and of the statute have in all respects been complied with, the affidavit, or a certified copy *of* the record *thereof, shall be* admitted as evidence that the power of sale \vas duly executed.

Si 3. Nothing contained in this act shall lie so Validity of construed as to . impair the validity of any foreclosure i[f]ri[c]n[i],7.1r[L]e'a. heretofore made. *Approved March 31, 1900.*

A ACT TO AUTHORIZE THE SALE *OF* THE FRANCHISE A[ND] *Ch* cip.220
PROPERTY OF THE RHODE ISLAND AND MASS.ACIMSETTS RAILROAD COMPANY TO THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COUPANY.

Be it enacted, etc., as follows:

SECTION 1. The Rhode Island and Massachusetts Rail- Zi2g7 road Company may sell its franchise and property to the gi9g.,,",en:%,t,tis N-ew York, New Haven and Hartford Railroad Company, and that company may purchase such franchise and prop- etcfrnnaG15 erty, UpOD such terms and conditions as may he agreed tO by the directors of said corporations, respectively, and approved by the board of railroad commissioners and by Votes of the shareholders of said corporations, respectively; and ::upon such purchase the purchaser shall become subject to and held to perform all the duties and obligations of the seller.

SECTtoN•2. This act shall take effect upon its passage.

Approved March 81, 1906.

C

Effective:[See Text Amendments]

Massachusetts General Laws Annotated Currentness
Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
'gyp Title **I.** Title to Real Property (Ch. 183-189)
Kg Chapter 183. Alienation of Land (Refs & Annos)
§ **21. "Statutory power of sale" in mortgage**

The following "power" shall be known as the "Statutory Power of Sale", and may be incorporated in any mortgage by reference:

(POWER.)

But upon any default in the performance or observance of the foregoing or other condition, the mortgagee or his executors, administrators, successors or assigns may sell the mortgaged premises or such portion thereof as may remain subject to the mortgage in case of any partial release thereof, either as a whole or in parcels, together with all improvements that may be thereon, by public auction on or near the premises then subject to the mortgage, or, if more than one parcel is then subject thereto, on or near one of said parcels, or at such place as may be designated for that purpose in the mortgage, first complying with the terms of the mortgage and with the statutes relating to the foreclosure of mortgages by the exercise of a power of sale, and may convey the same by proper deed or deeds to the purchaser or purchasers absolutely and in fee simple; and such sale shall forever bar the mortgagor and all persons claiming under him from all right and interest in the mortgaged premises, whether at law or in equity.

Current through Chapters 1 to 505 of the 2014 2nd Annual Session (C)

END OF DOCUMENT

C

Effective: (See Text Amendments]

Massachusetts General Laws Annotated Currentness
Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
'gyp Title **1.** Title to Real Property (Ch. 183-189)
Chapter 183. Alienation of Land (Refs & Annos)
—• —p § **8. Statutory forms; alteration or substitution; "incorporation by reference" defined**

The forms set forth in the appendix to this chapter may be used and shall be sufficient for their respective purposes. They shall be known as "Statutory Forms" and may be referred to as such. They may be altered as circumstances require, and the authorization of such forms shall not prevent the use of other forms. Wherever the phrase "incorporation by reference" is used in the following sections, the method of incorporation as indicated in

said forms shall be sufficient, but shall not preclude other methods.

Current through Chapters 1 to 505 of the 2014 2nd Annual Session

END OF DOCUMENT

Massachusetts General Laws Annotated Currentness

Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title I. Title to Real Property (Ch. 183-189)
%ii Appendix to Chapter 183
'gyp Statutory Forms of Instruments Relating to Real Estate
—o— Form (12)

(12) *Affidavit of Sale under Power of Sale in Mortgage.*

named in the foregoing deed, make oath and say that the principal _____ interest _____ obligation _____ mentioned in the mortgage above referred to was not paid or tendered or performed when due or prior to the sale, and that I published on the_____ day of_____ 19_, in the _____ , a newspaper published or by its title page purporting to be published in _____aforesaid and having a circulation therein, a notice of which the following is a true copy:

(Insert advertisement.)

Pursuant to said notice at the time and place therein appointed, I sold the mortgaged premises at _____ public auction by _____ , an auctioneer, to _____, above named, for_____ dollars, bid by him, being the highest bid made therefor at said auction.

Sworn to by the said _____ 19_, before me
Current through Chapters 1 to 505 of the 2014 2nd Annual Session

END OF DOCUMENT

E
ffective: July 1, 2000

Massachusetts General Laws Annotated Currentness
Part **11.** Real and Personal Property *and* Domestic Relations (Ch. 183-210)
Kra Title **I.** Title to Real Property (Ch. 183-189)
Kgi Chapter 185C. Housing Court Department (Refs & Annos)

§ 3. Concurrent jurisdiction; powers of superior court department; enforcement authority

The divisions of the housing court department shall have common law and statutory jurisdiction concurrent with the divisions of the district court department and the superior court department of all crimes and of all civil actions arising in the city of Boston in the case of that division, in the counties of Berkshire, Franklin, Hampden and Hampshire in the case of the western division and within the cities and towns included in the Worcester county division, northeastern division and southeastern division, in the case of those divisions, under chapter forty A, sections twenty-one to twenty-five, inclusive, of chapter two hundred and eighteen, sections fourteen and eighteen of chapter one hundred and eighty-six and under so much of sections one hundred and twenty-seven A to one hundred and twenty-seven F, inclusive, and sections one hundred and twenty-seven H to one hundred and twenty-seven L, inclusive, of chapter one hundred and eleven, so much of chapter ninety-three A, so much of section sixteen of chapter two hundred and seventy, so much of chapters one hundred and forty-three, one hundred and forty-eight, and two hundred and thirty-nine, jurisdiction under the provisions of common law and of equity and any other general or special law, ordinance, by-law, rule or regulation as is concerned directly or indirectly with the health, safety, or welfare, of any occupant of any place used, or intended for use, as a place of human habitation and the possession, condition, or use of any particular housing accommodations or household goods or services situated therein or furnished in connection there with or the use of any real property and
I ac ti v iti e s conducted there on as such use affects the health, welfare and safety of any resident, occupant, user or member of the general public and which is subject to regulation by local cities and towns wider the state building code, state specialized codes, state sanitary code, and other applicable statutes and ordinances. The divisions of the housing court department shall also have jurisdiction of all housing problems, including all contract and tort actions which affect the health, safety and welfare of the occupants or owners thereof, arising within and affecting residents in the city of Boston, in the case of that division, Berkshire, Franklin, Hampden and Hampshire counties, in the case of the western division and within the cities and towns included in the Worcester county division, northeastern division and southeastern division, in the case of those divisions, and shall also have jurisdiction in equity, concurrent with the divisions of the district court department, the divisions of the probate and family court department, the superior court department, the appeals court, and the supreme judicial court, of all cases and matters so arising.

In all matters within their jurisdiction, the divisions of the housing court department shall have all the powers of the superior court department including the power to grant temporary restraining orders and preliminary injunctions as justice and equity may require. The divisions shall have like power and authority for enforcing orders, sentences and judgments made or pronounced in the exercise of any jurisdiction vested in them, and for punishing contempts of such orders, sentences and judgments and other contempts of their authority, as are vested for

such or similar purposes in the supreme judicial court or superior court department.

CREDIT(S)

Added by St.1978, c. 478, § 92. Amended by St.1979, c. 72, § 3; St.1983, c. 575, § 2; St.1987, c. 245; St.1987, c. 755, § 3; St.1988, c. 83; St.2000, c. 159, §§ 245, 246.

Current through Chapters 1 to 505 of the 2014 2nd Annual Session

END OF DOCUMENT

Effective: November **1, 2012**

Massachusetts General Laws Annotated Currentness
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262) **ria**
Title Ill. Remedies Relating to Real Property (Ch. 237-245) **cg** Chapter 244.
Foreclosure and Redemption of Mortgages (Refs & Annos) § **14. Foreclosure under power of sale; procedure; notice; form**

The mortgagee or person having estate in the land mortgaged, or a person authorized by the power of sale, or the attorney duly authorized by a writing under seal or the legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee or person, may, upon breach of condition and without action, perform all acts authorized or required by the power of sale; provided, however, that no sale under such power shall be effectual to foreclose a mortgage, unless, previous to such sale, notice of the sale has been published once in each of 3 successive weeks, the first publication of which shall be not less than 21 days before the day of sale, in a newspaper published in the city or town where the land lies or in a newspaper with general circulation in the city or town where the land lies and notice of the sale has been sent by registered mail to the owner or owners of record of the equity of redemption as of 30 days prior to the date of sale, said notice to be mailed by registered mail at least 14 days prior to the date of sale to said owner or owners to the address set forth in section 61 of chapter 185, if the land is then registered or, in the case of unregistered land, to the last address of the owner or owners of the equity of redemption appearing on the records of the holder of the mortgage, if any, or if none, to the address of the owner or owners as given on the deed or on the petition for probate by which the owner or owners acquired title, if any, or if in either case no owner appears, then mailed by registered mail to the address to which the tax collector last sent the tax bill for the mortgaged premises to be sold, or if no tax bill has been sent for the last preceding 3 years, then mailed by registered mail to the address of any of the parcels of property in the name of said owner of record which are to be sold under the power of sale and unless a copy of said notice: of sale has been sent by registered mail to all persons of record as of 30 days prior to the date of sale holding an interest in the property junior to the mortgage being foreclosed, said notice to be mailed at least 14 days prior to the date of sale to each such person at the address of such person set forth in any document evidencing the interest or to the last address of such person known to the mortgagee. Any person of record as of 30 days prior to the date of sale holding an interest in the property junior to the mortgage being foreclosed may waive at any time, whether prior or subsequent to the date of sale, the right to receive notice by mail to such person under this section and such waiver shall constitute compliance with such notice requirement for all purposes. If no newspaper is published in such city or town, or if there is no newspaper with general circulation in the city or town where the land lies, notice may be published in a newspaper published in the county where the land lies, and this provision shall be implied in every power of sale mortgage in which it is not expressly set forth. A newspaper which by its title page purports to be printed or published in such city, town or county, and having a circulation in that city, town or county, shall be sufficient for the purposes of this section.

The following form of foreclosure notice may be used and may be altered as circumstances require; but nothing in this section shall be construed to prevent the use of other forms.

(Form.)

MORTGAGEE'S SALE OF REAL ESTATE.

By virtue and in execution of the Power of Sale contained in a certain mortgage given by..... to..... dated.....and recorded with

Deeds, Book....., page....., of which mortgage the undersigned is the present holder, ...

(If by assignment, or in any fiduciary capacity, give reference to the assignment or assignments recorded with Deeds, Book....., page....., of which mortgage the undersigned is the present holder, ...

for breach of the conditions of said mortgage and for the purpose of foreclosing the same will be sold at Public Auction at.....o'clock, ... M. on the ..... day of..... A.D. (insert year), ... (place)..... all and singular the premises described in said mortgage,

(In case of partial releases, state exceptions.)

To wit: "(Description as in the mortgage, including all references to title, restrictions, encumbrances, etc., as made in the mortgage.)"

Terms of sale: (State here the amount, if any, to be paid in cash by the purchaser at the time and place of the sale, and the time or times for payment of the balance or the whole as the case may be.)

Other terms to be announced at the sale.

(Signed) _____

Present holder of said mortgage.

A notice of sale in the above form, published in accordance with the power in the mortgage and with this chapter, together with such other or further notice, if any, as is required by the mortgage, shall be a sufficient notice of the sale; and the premises shall be deemed to have been sold and the deed thereunder shall convey the premises, subject to and with the benefit of all restrictions, easements, improvements, outstanding tax titles, municipal or other public taxes, assessments, liens or claims in the nature of liens, and existing encumbrances of record created prior to the mortgage, whether or not reference to such restrictions, easements, improvements, liens or encumbrances is made in the deed; provided, however, that no purchaser at the sale shall be bound to corn-

plete the purchase if there are encumbrances, other than those named in the mortgage and included in the notice of sale, which are not stated at the sale and included in the auctioneer's contract with the purchaser.

For purposes of this section and section 21 of chapter 183, in the event a mortgagee holds a mortgage pursuant to an assignment, no notice under this section shall be valid unless (i) at the time such notice is mailed, an assignment, or a chain of assignments, evidencing the assignment of the mortgage to the foreclosing mortgagee has been duly recorded in the registry of deeds for the county or district where the land lies and (ii) the recording information for all recorded assignments is referenced in the notice of sale required in this section. The notice shall not be defective if any holder within the chain of assignments either changed its name or merged into another entity during the time it was the mortgage holder; provided, that recited within the body of the notice is the fact of any merger, consolidation, amendment, conversion or acquisition of assets causing the change in name or identity, the recital of which shall be conclusive in favor of any bona fide purchaser, mortgagee, lienholder or encumbrancer of value relying in good faith on such recital.

CREDIT(S)

Amended by St.1975, c. 342; St.1977, c. 629; St.1980, c. 318, § 2; St.1981, c. 242; St.1981, c. 795, § 11; St.1991, c. 157, §§ 4, 5; St.1992, c. 285; St.1992, c. 287; St.1998, c. 463, § 181; St.2012, c. 194, § 1, eff. Nov. 1, 2012.

Current through Chapters 1 to 505 of the 2014 2nd Annual Session (C)

END OF DOCUMENT

Effective:fSee Text Amendments]

Massachusetts General Laws Annotated Currentness
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262) Kg]
Title III. Remedies Relating to Real Property (Ch. 237-245)
Rgi Chapter 244. Foreclosure and Redemption of Mortgages (Refs & Annos) ***§* 15.**
Copy of notice; affidavit; recording; evidence

The person selling, or the attorney duly authorized by a writing or the legal guardian or conservator of such person, shall, after the sale, cause a copy of the notice and his affidavit, fully and particularly stating his acts, or the acts of his principal or ward, to be recorded in the registry of deeds for the county or district where the land lies, with a note or reference thereto on the margin of the record of the mortgage deed, if it is recorded in the same registry. If the affidavit shows that the requirements of the power of sale and of the statute have in all respects been complied with, the affidavit or a certified copy of the record thereof, shall be admitted as evidence that the power of sale was duly executed.

CREDIT(S)

Amended by St.1946, c. 204; St.1991, c. 157, §§ 6, 7; St.1994, c. 341, § 1.

Current through Chapters 1 to 505 of the 2014 2nd Annual Session (C)

END OF DOCUMENT

Massachusetts General Laws Annotated Currentness
Massachusetts Rules of Civil Procedure
cm VII. Judgment

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for admission under Rule 36, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto ***or*** served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not

rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(1) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

CREDIT(S)

Amended March 7, 2002, effective May 1, 2002.

Current with amendments received through January 15, 2015. (C)

END OF DOCUMENT

C

Massachusetts General Laws Annotated Currentness
Trial Court Rules
Rig I. Uniform Summary Process Rules
Rule 5. Counterclaims

Counterclaims shall be permitted in accordance with the provisions of G.L. c. 239, § 8A. Counterclaims shall be set forth in the defendant's answer and shall be expressly designated as counterclaims. The right to counterclaim shall be deemed to be waived as to the pending action if such a claim is not filed with the answer pursuant to Rule 3, unless the court shall otherwise order on motion for cause shown. Counterclaims shall not be considered compulsory; that is, they shall not be considered waived for the purpose of a separate civil action or actions if not asserted in a summary process action. No responsive pleading to a counterclaim is necessary.

COMMENTARY

This rule recognizes the statutory right of summary process defendants to assert counterclaims. Counterclaims must be asserted with the defendant's answer. A plaintiff against whom a counterclaim is asserted is not required to answer; but an answer to a counterclaim may be filed prior to or at the time of the trial. The court may, of course, in its discretion grant a motion for a continuance in order to grant a party time to prepare a defense to a counterclaim. Because counterclaims are not compulsory, the court retains discretion to sever a counterclaim which cannot appropriately be heard as part of the summary process action. It would, however, appear to be contrary to the law to sever a counterclaim which is being relied upon as a defense under G.L. c. 239, § 8A.

It should be noted that the counterclaim provisions of G.L. c. 239, § 8A apply to premises "rented or leased for dwelling purposes".

RESEARCH REFERENCES

Treatises *and* Practice Aids

33A Mass. Prac. Series § 16:3, Commencement of Summary Process Action--Jurisdiction.

33A Mass. Prac. Series § 16:33, Breach of Covenant.

33A Mass. Prac. Series § 16:46, Waiver of Forfeiture.

Uniform Summary Process Rule 5, MA R SUM PROC Rule 5

Current with amendments received through January 15, 2015. (C)

END OF DOCUMENT

COMMONWEALTH OF MASSACHUSETTS
NORTHEAST HOUSING COURT

WELLS FARGO BANK

Plaintiff

-v.- No. 12-SP-0870

RONALD C. AMERO

Defendant

RULINGS AND ORDER

On May 21, 2012, I issued rulings and order in th:.s post-foreclosure summary process case:

First, that there was no warranty or covenant or contractual or quasi-contractual duty to repair as might support a defective housing "conditions" claim or defense under the habitability, quiet enjoyment, rent withholding, or other landlord tenant laws, Deutsche Bank v. Gabriel, 81 Mass.App. 564, 570-573, 955 N.E.2d 875, 880-882 (April 10, 2012);

Second, that affirmative equitable defenses and counterclaims are not available in post-foreclosure summary process proceedings, New Eficfland Mut. Life Ins. *cn. v.* Wing, 191 Mass. 192, 195. 77 N.E. 376, 377 (1906); Wayne Inv. Corp. v. Abbott, 350 Mass. 775, 216 N.E.2d 795 (1966) (rescript); and

Third, that the ruling in Fafard v. Lincoln Pharmacy of Milford, Inc., 439 Mass. 512, 789 N.E.2d 147 (2003), aff'g 10 Mass.L.Rptr. 480, 1999 WL 791689 (Worcester Superior Ct. No. 9300249B, Toomey, J., August 30, 1999), precludes the right to raise any counterclaim in post-foreclosure eviction actions that do not involve premises "rented or leased for dwelling purposes" and that separate suits and motions to consolidate are required in such cases.

I have since issued similar rulings in approximately twenty or twenty-five other similar cases.

Thereafter, the Supreme Judicial Court issued its dacision *in* 569, Eaton v. Federal National Mortgage Ass'n, 462 Mass. 969 N.E.2d 115, 1118 (June 22, 2012), remanding 29 Mass.L.Rptr. 2011 WL , 6379284 (Suffolk Superior Ct. No. SU-CV-2011-01382 McIntyre, J., June 17, 2011).

The Court's decision in that case, as well as the Court's decision in Bank of New York v. Bailey, 460 Mass. 327, 95: N.E.2d 331 (2011), cast considerable doubt as to the correctness- of my Fafard-based and Wing-Wayne-based rulings.

On motions for reconsideration, based on footnote 9 and the accompanying text of the Eaton decision, at 574, fn.9, 969 N.E.2d at 1123, fn.9, I held a consolidated hearing on July 18, 2012, in this and seventeen other similarly situated cases. Within the next four weeks counsel submitted supplemental briefs and memoranda. After considering the oral and written arguments made by counsel, I conclude that my Fafard-based and Wing-Wayne-based rulings are incorrect and must be vacated.[14]

I leave undisturbed my Gabriel-supported rulings, which the parties do not now dispute, that there is not in this or in the other similarly situated cases any contractual or quasi-contractual duty to repair on the part of the foreclosing mortgagee plaintiff or its predecessors that could give rise to a defective housing "conditions" claim or defense under the landlord tenant laws.

1/ The Housing Court, under Gen.L. c.185C §3, is onfl of the four Departments of the Trial Courts that has limited subject matter jurisdiction. Absent special order of transfer and assignment by the Chief Justice of the Trial Court under Gen.L. c.211B §9 and the doctrine of Konstantopolous v. Whateley, 384 Mass. 123, 424 N.E.2d 210 (1981), the Housing Court has no authority to adjudicate cases and controversies that do not involve residential housing. Although cases from courts of other Departments can be transferred into the Housing Court under Gen.L. c.185C §20, there is no discretionary authority for the Housing Court to remand or transfer a case out to a court of another Department. Thus, the subject matter jurisdiction of the Housing Court is both limited and mandatory. If there exists subject matter jurisdiction in a particular case, the Housing :.7ourt is obliged to exercise it.

The rulings I issue today are of first impression, and indeed place the litigants at some risk that the appellate courts will hold them erroneous. The defendants especially are at risk that if they succeed in this court their temporarily successful judgments may be vacated as lacking the support of subject matter jurisdiction (an issue which both the trial courts and the appellate courts are obliged to consider on their own mot:..on), but that their unsuccessful claims will be barred by the doctrine of res adjudicate. See, Harker v. Holyoke, 390 Mass. 555, 457 N.E.2d 1115 (1983).

At the July 18, 2012, consolidated hearing of these)natters I offered to report my rulings to the appellate courts under MRCvP Rule 64. All counsel declined. I note that interlocutory appellate review is available under Gen.L. c.231 §118.

1. Counterclaims

(1) Bailey and Eaton and *Fafard.* In Bailey at 334, 951 N.E.2d at 336, the Supreme Judicial Cdat stated, "The pursuit of 'speedy and inexpensive' summary process actions is compromise& if the Housing Court must stay summary process proceedings while litigation on the validity of the foreclosure proceedings continues in another court. This creates precisely the type of unnecessary delay and inefficiency that the Legislature intended to eliminate when it reorganized the trial courts in the Commonwealth. See G.L. c.211B."

In Eaton at 574, fn.9, 969 N.E.2d at 1123, fn.9, the Supreme
41 Judicial Court stated, "A Housing Court judge subsequently [after the defendant filed a counterclaim] granted a sixty-day stay of the summary process action to give Eaton an opportunity to *seek* relief in the Superior Court. [FN9] This decision preceded Bank of N.Y. v. Bailey, 460 Mass. 327, 333-334, 951 N.E.2d 331 [335-336) (2011), in which we held that the Housing Court had concurrent jurisdiction to entertain a counterclaim alleging an invalid foreclosure sale in a summary process action for eviction."

It is true that the statement in Eaton that the Housing Court had concurrent jurisdiction with the District Court and the Superior Court to entertain counterclaims in post-foreclosure
41 summary process eviction cases is dictum, because the statement is not essential to the holding in that case. The statement cannot be viewed as idle comment, however, and it is dictum only because only the order of the Superior Court issuing a preliminary injunction, and not the underlying Housing Court order issuing a stay of the summary process action and referring the parties to the Superior Court, was made the subject of an appeal.

It is also true that the "counterclaim" filed in Eaton, described at 573, 969 N.E.2d at 1123, as arguing that the underlying foreclosure sale was invalid because the plaintiff's predecessor did not hold the mortgage note at the tine of the foreclosure sale, was not strictly necessary, as that argument might have been raised by pleading an affirmative defense. or even under the general issue in challenge to the plaintiff's, case-in-chief.

Similarly, the Bailey case is distinguishable on its facts. In Bailey, the post-foreclosure summary process plaintiff challenged the Housing Court's jurisdiction to consider "the claim raised by Bailey's defense," as described at 328, 969 /T.E.2d at 331, that the plaintiff's title was invalid because the fo:reclosure was not conducted strictly according to statute, as described at 332, 969 N.E.2d at 335. The Supreme Judicial Court held, at 334-335, 969 N.E.2d at 336-337, that Bailey's "claim" was sufficient to defeat the plaintiff's prima facie case. Bailey's "c:.aim" was raised not by counterclaim, instead by pleading an affirmative

defense. Indeed, as noted at 331 fn.8, 969 N.E.2d at 32,4: fn.8, Bailey's answer set forth various counterclaims which the trial court dismissed and were not made the subject of any appeal..

Thus neither the Bailey case nor the Eaton case specifically involved the justiciability of counterclaims (or equitable defenses) in post-foreclosure eviction cases. However, my reading of the decision in Eaton and my re-reading of the decision in Bailey cause me to doubt whether our appellate courts would agree with my Fafard-based ruling that counterclaims that are outside the purview of the Rent Withholding Law, Gen.L. c.239 §8A, cannot be raised in residential property summary process eviction cases. I similarly doubt whether the appellate courts would agree with my Wing-Wayne-based ruling that equitable defenses cannot be raised in such actions. Upon reconsideration, I conclude that they would not.

(2) *Fafard* and *Hemingway* and post-Fafard counterclaim cases outside Section 8A. In my earlier ruling, I held that the counterclaim question is controlled by the Supreme Judicial Court's decision in the Fafard case. There, the Court squarely heLd that, notwithstanding the Massachusetts Rules of Civil. Procedure, and notwithstanding considerations of efficiency and judicial economy, the literal statutory language of Gen.L. c.239 §8A *does* not authorize, and also does not permit, counterclaims in summary process actions for commercial property, because such ac·:ions are not "action[s] ... to recover possession of premises rented or leased for dwelling purposes," and that in those cases separate suits and motions to consolidate are required. In my earlier ruling, I held that arguments based on Rule 18(a) of the Massachusetts Rules of Civil Procedure, arguments based on historic common law rulings, and arguments based on prior interpretations of Gen.L. c.239 §8A, are precluded by the ruling in the Fafard case. Based on the statutory language, and on the Court's view that the statute displaced the right to counterclaim under MRCvP Rule 18(a), I concluded that the Fafard-based limitation on the :right to counterclaim in summary process cases applied not only to cases involving commercial property but to cases involving residential property as well.

However, the Fafard case is distinguishable on its facts because it involved commercial and not residential property. And, importantly, there is no indication in the Fafard opinion that the Court intended to overrule its ruling, thirty years earlier, in Boston Housing Authority v. Hemingway, 363 Mass. 134, 293 N.E.2d 831 (1973), which held, at 202-203, 293 N.E.2d at 345, that, although the defendant had no right to defend on the basis of the Rent Withholding Law, Gen.L. c.239 §8A, because she had not complied with the procedures established by that statute, she still had the right, apart from the statute, to raise a partial or complete defense to the landlord's claim for rent, and to claim or "counterclaim" for damages, based on the landlord's breach of the

common law implied warranty of habitability,- The Hemingway Court also stated, at 196 fn.10, 293 N.E.2d at 841 fn.10, "The Boston Housing Authority argues that even if there is an implied wlrranty of habitability, c.239 §8A offers tenants the exclusive remedy for its breach. However, there. is no evidence to indicate that the Legislature intended the limited remedy afforded by c.239 §8A to exclude appropriate additional remedies created by changes in the common law." Upon reconsideration in this and seventeen other similarly situated *cases,* I now conclude that in Fafard the Supreme Judicial Court left intact the right, apart from statute, of a defendant in a residential housing summary process case to file counterclaims.

It is significant. that, although the defendants filed counterclaims both in the Eaton case and in the Bailey case, neither decision in those cases mentions the Court's decision in the Fafard case which interpreted Gen.L. c.239 §8A in such away as eliminated the right to file counterclaims in commercial eviction cases. It appears that in both the Eaton case and in the Bailey case, the Supreme Judicial Court assumed, although it did not explicitly so state, that the Fafard case's elimination of the right to counterclaim in commercial property eviction cases does not affect the right to counterclaim in residential ?roperty summary process cases.

41 The Supreme Judicial Court's assumption that post-foreclosure summary process defendants have the right to counterclaim seems to. be shared by the Appeals Court as well. In'the post-foreclosure summary process case of Duggan v. Gonsalves, 65 Mass.App. 250, 636 N.E.2d 614 (2005), the defendant filed counterclaims alleging breaches of fiduciary duty, of implied duties of good faith and fair dealing, misrepresentation, and violation of chapter 91A. The counterclaims sought equitable relief including the imposition of a constructive trust. In Duggan, the Appeals Court stated, at 254 fn.6, 838 N.E.2d at 618 fn.6, "The jurisdiction of the Housing Court extends over 'civil actions arising under the provisions of common law and of equity .., concerned directly or indirectly with ... the possession, condition, or use of any. particular housing accommodations.' G.L. c.185C §3. *** That jursdiction encompassed the original summary process action, as well as the counterclaims, including the request for imposition of an equitable constructive trust."

To be sure, in the Duggan case the premises were "rented or leased for dwelling purposes",andthe counterclaims in that case,' although highly (and thankfully) unusual, fit comfortably *within* the words of the statute. However, in the case of Prescott v. Bowen, 71 Mass.App. 1114, 883 N.E.2d 341 (R.1:28 decision 2008), which was an executor's summary process suit brought against the daughter of the deceased, the defendant occupied the premises for dwelling purposes, but they were never "rented or leased" to her. In the Prescott decision, the court did not say that t'ae Fafard ruling prevented the residential occupant from filing counterclaims, only, at fn.5, and citing Dur7cTan. that "Bowen asserted no cognizable counterclaims to the action."

The case of Metropolitan Credit Union v. Matthes, 46 Mass.App. 326, 706 N.E.2d 296 (1999), is instructive. The Natthes case was a post-foreclosure summary process action that involved residential property. There was no rental or lease relationship between the parties. The defendants filed counterclaims, for breach of contract, wrongful foreclosure, and for relief under chapter 93A. The counterclaims were not dismissed for lack of justiciability, but were instead heard and adjudicated on the merits on the plaintiff's motion for summary judgment. Although the Matt*.aes case *was* decided before the decision in the Fafard case, both appellate courts have *since* cited the Matthes case favorably, in Bailey at 332, 334, 951 N.E.2d at 335, 336, and in Gabriel at 566, 965 N.E.2d at 877.

See also, Mulvanity v.. Pelletier, 40 Mass.App. 106, 661 N.E.2d 952 (1996), where counterclaims were filed against the defendant's grandson and his wife under Gen.L. c.239 §8A for breach of contract and intentional infliction of emotional distress based on an oral lifetime tenancy allegedly created by the plaintiff's predecessors when the defendant and her. husband deeded over their two-family house to their daughter and son-in-law who later transferred the property to their son and daughter-in-law.

There is no indication in the reported appellate court cases that the Fafard ruling eliminating the right to counterclaim in commercial eviction cases applies also to post-foreclosure summary process cases involving residential property. Indeed, nowhere in the appellate courts' recent decisions involving post-foreclosure residential property summary process cases, U.S. Bank v, Ibanez, 458 Mass. 637, 941 N.E.2d 40 (2011) , Bank of New York v. Bailey, 460 Mass. 327, 951 N.E.2d 331 (2011) , Bevilacqua v. Rodriquez, 460 Mass. 762, 955 N.E.2d 884 (2011), Deutsche Bank v. Gabriel, 81 Mass.App. 564, 965 N.E.2d 875 (2012), Eaton v. Federal National Mortgage Ass'n, 462 Mass-569, 969 N.E.2d 1118 (2012), is the Fafard decision even mentioned.

(3) Difficulties with' *Fafard.* When I issued my earlier rulings on May 21, 2012, in this and other similar oases, I expected: either that the defendants would promptly file separate suit (to avoid expiration of the applicable statutes of limitation) and move to consolidate the cases, consistent with Fafard, or that the plaintiffs (whose interest, I presume, is in accordance with MRCvP Rule 1 and USPR Rule 1, "to secure the just, speedy and inexpensive determination" both of their rights to summary process possession and to lack of liability on the defendants' adverse claims) would agree and stipulate that the deJ!endants'-counterclaims be heard in summary process, in one case, before one court, one judge or jury, without the need to have the summary process and opposing claims heard before two (or more) courts, judges or juries. However, in the past several months foLlowing my rulings, my expectations have not been realized. In none of these cases, have the defendants filed separate suits, and in :zone have the plaintiffs agreed that the defendants' claims and defenses be heard as part of the summary process actions.

The defendants, who .are mostly self-represented, but are sometimes assisted by volunteer or legal aid attorneys through the Lawyer for the Day and Limited Assistance Representation programs, say that they have difficulty bringing separate suits. See, e.g., Bailey at 329, 951 N.E.2d at 333, where the Court observed that Bailey's action against MERS as "nominee" in the Superior Court seeking to set aside the foreclosure sale eventually was dismissed for failure to effect timely service.

The defendants also complain that when they do manage to bring separate suit, their opponents frequently remove their Superior Court filings to the United States District Court, as happened in cases connected with FNMA v. Konq, N.E.Hsg.Ct. No. 11-SP-1309, Aurora v. Shapiro, N.E.Hsg.Ct. No. 11-SP-3608, and Mellon v. Cioffi, N.E.Hsg.Ct. No. 12-SP-0536.

These facts are puzzling. I cannot imagine why a summary process plaintiff would choose to delay adjudication of ie.s case, without good reason to do so, either by refusing to accept service of process in a related case, or by removing the related case from the state to the federal court. I also think that the possibility of a distant forum abuse claim, Schubach v. Household Finance Corp., 375 Mass. 133, 376 N.E.2d 140 (1978), would dissuade any litigant, especially an institutional litigant, from imprudently removing a consumer's lawsuit from state to federal court.

Still, I cannot ignore what is plainly shown upon my docket. In commercial cases adherence to the Fafard pleading and procedure requirements may be little more than an inconvenience, where counterclaims are dismissed without prejudice to separate suit and motion to consolidate the two cases, in the same court. In post-foreclosure residential housing cases, however, it seems clear beyOnd question that dismissal of counterclaims, requiring those claims to be re-filed as separate suits, in a different court, is not only inefficient, it creates obvious hardship and injustice for many self-represented litigants.[1/]

2/ it is worth noting that in Ludwig v. Massachusetts, 427 *U.S.* 618, 632 (1976) the four Justices dissenting thought that requiring a defendant to undergo a bench trial as a condition of appeal for trial de novo so severely burdened the rights to speedy trial and trial by jury that in criminal cases the two-_ter court system offended the United States Constitution. But see, Lindsay v. Normet, 405 U.S. 56 (1972), where the Court held that Oregon's Forcible Entry and Wrongful Detainer law, which in a nonpayment of rent case precluded defenses (but not an independent suit.) based on the landlord's breach of duty to maintain the premises, cdi.d not, on

(footnote continued on next Page)

(4) Applying *Hemingway* and Fafard. I did not anticipate the result of the Fafard case because I thought it unlikely that the Legislature, in enacting the Rent Withholding Law, Gen.L, c.239 §8A, which it made applicable only to residential tenancies, would have intended, or even would have considered, that its e'llactment might be interpreted to eliminate the general rights of all litigants, including summary process litigants, to counterclaim under mRCvP Rule 18(a) and pre-existing law. In Hemingway, after all, the Court had held quite the opposite.

In Hemingway the Court held, at 202-203, 293 N.E.2d at 845, that notwithstanding the tenant's inability to defend or counterclaim under the Rent Withholding Law, Gen.L. c.239 !;8A, she still had the right to "claim or counterclaim" for damages based on the landlord's breach of the common law warranty of habitEtbility, and that, at 196 tn.10, 293 N.E.2d at 841 fn.10, "there is no evidence to indicate that the Legislature intended the limited remedy afforded by c.239 §8A to exclude appropriate additional remedies created by changes in the common law."

In Fafard, however, the Court, without mentioning its Hemingway decision, invoked the maxim that "a statutory expression of one thing is an implied exclusion of other things omit·.¯..ed from the statute," and held that "the establishment of a tenant's right to bring a counterclaim in residential actions is persuasive that the Legislature meant to reject the right in commercial proceedings."

Adherence to the reasoning of both cases is impossible. The holdings in the cases cannot be harmonized. The Hemingqway and Fafard cases are in hopeless conflict.

2/ (footnote continued from previous page)

its face, deny the tenant due process or equal protecticn of the laws. (In that case no direct challenge was made to Oregon's dual level trial de novo system, Id. at 64 fn.7; moreover, Oregon's statute provided for a stay of the FED action untiL certain equitable matters are determined. Id. at 66 fn.l1.) And see, Bianchi v. Morales, 262 U.S. 170 (1923) (Holmes, J.), where the Court upheld Puerto Rico's mortgage law which provided summary foreclosure of a mortgage without allowing any defense except payment, and allowed other equitable defenses to be set 1.1.:p only by separate action to annul the mortgage; Grant Timber & Mfq,._ Co. v. Gray, 236 U.S. 133 (1915) (Holmes, *J.),* where the Court upheld against due process attack a Louisiana procedure that provided that a defendant sued in a possessory action for real property could not bring an action to establish title or present equitable claims until after the possessory suit was brought to a conc1u3ion.

In my prior ruling I did not properly consider whether Hemingway instead of Fafard applies to post-foreclosure: summary process cases involving residential property. After reviewing the Hemingway decision, and. the residential housing eviction cases decided after Fafard, I conclude that my earlier ruling in this case, applying the Fafard doctrine to. post-foreclosure residential housing eviction cases,- is incorrect. Whatever may be the continued vitality of the Fafard ruling in commercial eviction cases, I am of the opinion that the Fafard ruling's elimination of the right to counterclaim in summary process cases involving commercial property is not and will not be extended by the appellate courts to post-foreclosure residential property summary process cases.

2. Equitable Claims and Affirmative Defenses

(1) The "rule" of *Wing* and Wayne and statutory support. In my prior ruling in this case I held, on the authority of New England Mut. Life *Ins.* Co. v. Wing, 191 Mass. 192, 195, 77 N.B. 376, 377 (1906) and Wayne Inv. Corp. v. 'Abbott, 350 Mass. 775, 215 N.E.2d 795 (1966) (rescript) , that defendants in post-foreclosure summary process cases are limited to challenging only the regular:ity of the plaintiff's foreclosure procedures, and that independent suit in equity is required to raise other claims and defenses. I had ruled similarly in Fairfield Affiliates v. Colangelo, N.E.Hsg.Ct. No. 95-SP-0117 (April 14, 1995); WM Specialty Mortgage LLC v. Nadeau, N.E.Hsg.Ct. No. 09-SP-1252 (June 18, 2009); Demeter v. Dyer, N.E.Hsg.Ct. No. 09-SP-1238 (August 24, 2009); and Wachov:st Bank v. Dwinell, N.E.Hsg.Ct, No. 09-SP-3993 (March 18, 2010).

However, as I noted in my prior ruling in this case (and also in the Colangelo case), the cases of Wing (decided in 1906) and Wayne (decided in 1966) may not be good authority because Rule 2 (and Rules 8 and 13 and 18) of the Massachusetts Rules of Civil Procedure, effective July 1, 1974, established one form of civil action, and brought about a unification and merger of the procedures at law and in equity. See, Lawless-Mawhinnev Motors. Inc. v. Mawhinnney, 21 Mass.App. 738, 741, 490 N.E.2d 475, 477 (1986) ("the defenses which a tenant may set up in s. summary process proceeding ... could include equitable defenses [citing Gen.L. c.231 §31 and Uniform Summary Process Rule 9). *** It taxes the imagination as to just what remedies were beyond E.vail to a tenant-defendant even in the pre-1974 era in which those cases were decided. None seem to be beyond reach now that the procedural distinctions between actions at law and suits in equity have been abolished [citing MRCvP Rule 2; see also Rule 1]." I suggested.in my prior ruling in this case that the issue might be resonsiderbd upon further briefing and legal arguments by the parties. Now, upon reconsideration in this and seventeen other similarlysituated cases, after hearing and considering the briefs and arguments made by counsel, I vacate my prior ruling_

The "rule" in post-foreclosure summary process cases stated in the Supreme Judicial Court's 1966 one-paragraph rescript decision in Wayne:

> "The purpose of summary process is to enable the holder of the legal title to gain possession of premises wrongfully withheld. Right to possession must be sh.ciwn and legal title may be put in issue. Sheehan Constr. Co. v. Dudley, 299 Mass. 51, 53, 12 N.E.2d 182. Legal title is established in summary process by proof that the title was acquired strictly according to the power of sale provided in the mortgage; and that alone is subject, to challenge. If there are other grounds to set aside the foreclosure the defendants must seek affirmative reJ.:.ef in equity. New England Mut. Life Ins. Co. v. Wing, 191 Mass. 192, 195, 196, 77 N.E. 376. The rule applies he::e. The issue of lack of good faith is not available to a defendant in summary process."

As I observed in the Colangelo case, the "rule" (if it is a "rule") has not been applied uniformly. For many years, equitable defenses have been permitted in cases at law. The cases include writ of entry cases: Sherman v. Galbraith, 141 Mass. 440, 142-443, 5 N.E. 858, 860 (1886); Twomey v. Linnehan, 161 Mass. 91, 94, 36 N.E. 590, 591 (1894); Nazro v. Long, 179 Mass. 451, 455-456, 61 N.E. 43 (1901); Nash v. D'Arcy, 183 Mass. 30, 31-32, 66 N.E. 606, 607 (1903); Hastings v. Lawson 187 Mass. 72, 73, 72 N.E. 252, 253 (1904); Bancroft Trust Co. v. Canane, 271 Mass. 191, 198-199, 171 N.E. 281, 284 (1930). The cases also include summary process cases: Ferguson v. Jackson, 180 Mass. 557, 558, 62 N.E. 965, 965-966 (Holmes, C.J. 1902); Chase v. Aetna Rubber Co., 321 Mass. 721, 723-724, 75 N.E.2d 637, 638-639 (1947); Elm Farm Foos Co. v. Cifrino, 328 Mass. 549, 553,, 105 N.E.2d 366, 369 (1952); Ace Trophy Co. v. Gordon, 354 Mass. 767, 238 N.E.2d 363, 364 (1968) (rescript); Lawless-Mawhinney Motors, Inc. v. Mawhinqaty, 21 Mass.App. 738, 740-743, 49.0 N.E.2d 475, 476-478 (1986).

These cases were decided under Gen.L. c.231 .§31, 35 ,(applicable to the Superior Court as originally enacted by St.1883 Ch.223 Sec.14, and made applicable to the District Court by St.1913 Ch.307), which statutes provide that a defendant may allege in defense any facts which would entitle him "in equity to ,be absolutely and unconditionally relieved" against the plaintiff's claim (and that a plaintiff may allege in ,reply to a defense any facts which would entitle him to be "absolutely and uncondLtionally relieved in equity" against such defense).

Thus, the "rule" stated in the Supreme Judicial Cou::t's 1966 one-paragraph rescript decision in the Wayne case may he seen as nothing more than a specific application of the rule con': ained in the statute, that only those equitable defenses as wou:d entitle the defendant to be "absolutely and unconditionally relieved". of

the opposing claim may be raised in an action at law. See the early case of Sherman v. Galbraith, 141 Mass. 440, 5 N.E. 858 (1886), where the Court held that an equitable defense could not be set up under St.1883 Ch.223 Sec.14 to a writ of entry tc recover possession of land, that it was not the effect of the sta.tute to convert a writ of entry into a bill in equity, and that an equitable defense is available to a writ of entry only when such a defense, if established, would "absolutely and unconditeonally" defeat the plaintiff's claim for possession under his title.

Curiously, it appears. that both the 1906 Wing case and the 1966 Wayne case disallowing equitable claims and defenses in summary process were decided without mentioning the statute, Gen.L. c.231 §31.

It also appears that the more recent summary process cases allowing equitable claims and defenses were decided apart from, and without mentioning the statute, Gen.L. c.231 §31: Boston Housing Authority v. Hemingway, 363 Mass. 184, 189-191, 199-200, 202-203, 293 N.E.2d 831, 837-838, 843, 845 (1973) (partial or complete defense to claim for rent, and claim or counterclaim for damages, based on landlord's breach of common law implied warranty of habitability, replacing common law equitable docte'ine of constructive eviction); Mulvanity v. Pelletier, 40 Mass.App. 106, 661 N.E.2d 952 (1996) (counterclaims for breach of contract and emotional distress based on oral lifetime tenancy allegedly created when defendant and her husband deeded over their two-farrily house to their daughter and son-in-law who later transferred the property to their son and daughter-in-law); Metropolitan Credit Union v. Matthes, 46 Mass.App. 326, 706 N.E.2d 296 (1999) (counterclaims for breach of contract, wrongful foreclosure, and relief under. chapter 93A, in post-foreclosure summary process case); Luggan v. Gonsalves, 65 Mass.App. 250, 838 N.E.2d 614 (2005) (counterclaims in post-foreclosure summary process case for breach of fiduciary duty, implied duties of good faith and fair dealing, misrepresentation, and violation of chapter 93A, and for equitable relief including the imposition of a constructive trust); Prescott v. Bowen, 71 Mass.App. 1114, 883 N.E.2d 341 (R.1:28 decision 2008) (various equitable defenses and claims, including right to purchase property, fiduciary responsibility to assure that beneficiaries benefit from estate, and various failures on the part of the executor, although none were cognizable or non-frivolous to the executor's summary process suit for eviction).

(2) Merger of law and equity. That the recent cases do not speak to any statutory limits on equitable claims or defenses in summary process actions seems quite understandable, in view of the adoption of the Massachusetts Rules of Civil Procedure, St.1973 Ch.1114, 365 Mass. 733 (1974), effective July 1, 19'14, which abolished the procedural distinctions between actions at law and

suits in equity. See, Lawless-Mawhinney Motors, Inc. v. Mawhinnney, 21 Mass.App. 738, 741, 490 N.E.2d 475, 477 (1986) ("the defenses which a tenant may set up in a summary process proceeding ... could include equitable defenses .... It taxes the imagination as to just what remedies were beyond avail to a tenant-defendant even in the pre-1974 era .... None seem to be beyond reach now ahat the procedural distinctions between actions at law and suits in equity have been abolished.")

(3) Other changes. The merger of law and equity, by the adoption of uniform Rules .of Civil Procedure that are applicable throughout the seven Departments of the Trial Court, was an important development. But much more has changed since the Wing and Wayne cases were decided in 1906 and 1966.

The statutory remedy of summary process to recover pcssession of land, Gen.L. c.239, as an alternative to the common law action of trespass or writ of entry, has its origins in the English Forcible Entry and Wrongful Detainer laws that became a part of. Massachusetts common law. The prohibition against forcible entry is now contained in Gen.L. c.184 §18 and that statute provides for enforcement in equity. The summary process remedy is in Gen.L. c.239 §1 et seq. The enactment of St.1825 Ch.89 Specifically provided remedies for landlords and tenants, to persons having the right of possession of houses and tenements. The enactment of St.1879 Ch.237 specifically made summary process available to the purchaser of property at a foreclosure sale. See generally, Page v. Dwight, 170 Mass. 29, 48 N.E. 850 (1897) , cited in Palley at 335, 951 N.E.2d at 332.

Summary process cases were typically heard before Justices of the Peace, Trial Justices, and Police Courts, before those tribunals were replaced by the District Court, with appeal de novo to the Courts of General Sessions, which became the SuperLor Court. Although the lower court *summary process tribunals* were courts of record in the sense that their judgments were recorded and enforceable, the inferior. courts which administered "common sense" or "rough justice" in a highly localized and personalised manner were staffed by part-time judges who lacked formal legal training, uniform terms of office, and uniform salaries, and the courts themselves, which functioned independently of each other, lacked regularized sittings and uniform business hours, unifoam forms, rules and procedures, uniform subject matter jurisdiction, and adequate record keeping. Preservation of the rights to trial by jury and to justice administered by a trained judge was by way of appeal de novo to the Superior Court. See generally, J.S. Berg, Rough Justice to Due Process: The District Courts of Massachusetts 1869-2004 (MCLE 2004). *See* also, K.'McDermott,The Development of the Massachusetts District Courts, 1821-1922, 15 Hist.J.Mass. 154 (1987); S.R. Bing & S.S. Rosenfeld, The Ouality of Justice in the Lower Criminal Courts of Metropolitan Boston (LCCRUL 1970) ("The Orange Book").

Enormous changes have since occurred. Perhaps most important is that by the Court Reform Acts, St.1978 Ch.478 and St.1992 Ch.379, there is now a single, unified Trial Court with the District Court, the Municipal Court, and the Housing Court included as three of the Trial Court's seven Departments.

The District Court began to allow electronic recording of trials and proceedings in 1972, and by 1975 had installed electronic recorders in ,all District Courts throughout the Commonwealth. See, Berg, Rough Justice, at 58-60. There was not a single full-time judge in the District Court until 1949; by 1954 the number was only 7; in 1956 the number of full-time j..iges was increased from 11 to 42. In 1979 the District Court "special justice" system was eliminated, and a full-time judiciary was established, with uniform salaries for all Massachusetts. Trial Court judges. See, Berg, Rough Justice, at 18-24, 30-31, 60-63, 94. Civil jury trials were. available in one District Court on an experimental basis in 1957, and in another in 1969. See, Berg, Rough Justice, at 38 fn.108. By the enactment of St.2004 Ch.252, the trial de novo system was finally eliminated, and was replaced by the present one-trial system, with facts-final bench or jury trial adjudications in all District Courts.

With respect to equity jurisdiction, the Legislature conferred upon the District Court: equity powers in code enforcement actions, co-extensive with the Superior Court, Gen.L. c.218 §19C, added by St.1970 Ch.582; equitable powers and jurisdiction in summary process actions, co-extensive with the Housing Court, Gen.L. c.218 §19, amended by St.1987 Ch..755 Sec.7, St.1988 Ch.199 Sec.40; and equitable powers and jurisdiction and authority for declaratory judgments in summary process actions and in civil actions for money damages. co-extensive with the Superior Court, Gen.L. c.218 §19C, amended by St.2004 Ch.252 Sec.8.

The equity powers of the Housing Court (in all matters within its subject matter and geographic jurisdiction) have a:.ways been co-extensive with those of the Superior Court. See, Gen.b. c.185C §3, added by St.1978 Ch.478 Sec.92; prior law Gen.L. c.185A §3, added by St.1971 Ch.843 Sec.3.

Thus the "affirmative relief in equity" which the Wayne *case* required, and which was available only in the Superior Court when the Wing and Wayne cases were decided in 1906 and 19E;(, is now available not only in the Superior Court but also in the District Court, the Municipal Court, and the Housing Court.[1]/

3/ 1 note in passing that St.1973 Ch.1114 Sec.164 and St.1975 Ch.377 Sec.79 inserted the words "in civil proceedings which are not governed by the Massachusetts Rules of Civil Procedure" in Gen.L. c.231 §35 but not in' Gen.L. c.231 §31. The omission appears to be inadvertent. Regardless, the equity jurisdiction and powers of the Housing Court and Superior Court are not affected, as Gen.L. c.231 g31 in its present form applies only to the District Court.

(4) Res adjudicata considerations. The defendants say that there are good reasons to allow them to seek "affirmative relief in equity" in this court and in this proceeding. They point to the res adjudicata effects of summary process judgments as an important consideration. The defendants argue, persuasively, that summary process judgments cannot be given preclusive effect if the summary process proceedings "lacked full and fair opportunity to :.itigate the issue" and that a full and fair opportunity must include the opportunity to raise equitable claims and defenses (and counterclaims) affecting the validity of the plaintiffs' title. See generally, Alba v. Raytheon Co., 441 Mass. 836, 841-1142, 809 N.E.2d 516, 521 (2004), quoting Martin v. Ring, 401 Mass. 59, 62, 514 N.E.2d 663, 665 (1987). See,Bravo-Buenrostro v. OneWast Bank, Suffolk Superior Ct. No. 11-03961 (Fahey, J., March 31, 2011), pp.4-7, 7-8.i/

The summary process .action tries possession, not title to real property, and in a landlord tenant case, the tenant is estopped to deny his landlord's title. Connors v. Wick, 317 Mass. 629-630, 59 N.E.2d 277, 277-278 (1945). Thus the question of title, not being in issue, is not adjudicated.

In summary process by a purchaser at a mortgagee's sale, however, the purchaser's right of possession derives ;from his title. The question of title in a post-foreclosure summary process case is always and necessarily adjudicated.

As to questions of title the summary process judgnent has permanent res adjudicata effect. See, Sheehan Constr. Co. v. Dudley, 299 Mass. 51, 12 N.E.2d 182 (1937), S.C. 299 Mass. 48, 12 N.E.2d 180 (1937), S.C. sub nom. Barry v. Dudley, 282 Mass. 258, 184 N.E. 815 (1933) (post-foreclosure summary process judgment in District Court and after appeal de novo in Superior Court were given res adjudicata effect between the same parties or those in privity as to disputed question of title to the premises in subsequent writ of entry proceeding in Land Court). See also, Urban v. Ouimet Stav & Leather Co., 355 Mass. 32, 242 N.E.2d 878 (1968) (because equitable defenses of constructive evict::.on could have been set up in the District Court under Gen.L. c.231 §31, the District Court judgments for unpaid rent were given res adjudicata effect as to claim of constructive eviction in subsequent bill in equity in the Superior Court).

4/ Under US2R Rule 5, counterclaims in summary process cases are said to be permissive rather than compulsory. But see the contrary dictum in Ben V. Schultz, 47 Mass.App. 808, 811 fn.3, 716 N.E.2d 681, 684 fn.3 (1999) ("The tenant's claims under '3.1.1. c.186 S14 and S18, and under G.L. c.93A were compulsory counterclaims in a summary process proceeding"). Thus, a defendant in a post-foreclosure summary process case who has claims or counterclaims, legal or equitable, but who does not raise them, acts at her peril.

All that a plaintiff landlord must show to establish a prima facie case is that there was a landlord tenant relationship and that it was terminated, .typically by expiration of a lease or by the giving of a statutory notice to quit.

In a summary process action for possession after a fo·.:eclosure sale, the plaintiff's prima facie showing consists of his deed to the property and an affidavit of sale showing that the power of sale and the requirements of the foreclosure statute have been complied with. See, Bank of New York v. Bailey, 460 Mass. 327, 334-335, 951 N.E.2d 331, 336-337 (2011). If put to proof, the plaintiff must additionally prove that the foreclosing party held the mortgage at the time of foreclosure, U.S. Bank v. Ibanez, 458 Mass. 637, 941 N.E.2d. 40 (2011), and must show the chain of assignments and deeds if relevant, Bevilacqua v. Rodriquez, 460 Mass. 762, 955 N.E.2d 884 (2011); Bailey at 331 fn.6, 951 N.E.2d at 334 fn.6. In foreclosures. for which the notice of sale is given after the date of the Eaton decision, the plaintiff must also prove that the foreclosing party either held the note or acted on behalf of the note-holder at the time of the foreclosure. Because these facts may be put in issue- in the plaintiff's case-in-chief, the defendant's rights are not prejudiced by any inability to plead an affirmative defense or counterclaim.

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After Eaton it would seem still open to a defendant: to prove that the underlying note was paid and cancelled, or that it is 'in the hands of a third party who can enforce it, in order to defeat the plaintiff's title and right of standing. It would seem that the defendant might prove these facts under the general issue without pleading a counterclaim or affirmative defense. See, Bevilacqua v. Rodriguez, 460 Mass. 762, 955 N.E.2d 8E4: (2011); Beaton v. Land Court, 367.Mass. 385, 326 N.E.2d 302 (1975). But see, Howe v. Wilder, 77 (11 Gl-ay) Macs. 257, 268, 269 (1858) (using the words "estoppel" and "equitable claim"); Wolcott v. Winchester, 81 (15 Gray) Mass. 461, 465 (1860) ("estop"), which suggest that such proof would come in. on the defendant's equitable defense rather than on the plaintiff's case-in-chief.

It would seem also that, under the general issue without the need 'to file a counterclaim or plead an affirmative defense, a defendant might offer to prove that the plaintiff did not give notice of the right to-cure under Gen.L. c.244 §35A, or that the notice failed to strictly comply with statutory requiremeuts. I am aware of no appellate court ruling addressing this issue, but at least one trial judge has held that a defective cure rights notice gives rise to a good defense. See, Bravo-Buenrostro v. OneWest Bank, Suffolk Superior Ct. No. 11-03961 (Fahey, *J.*, March 31, 2011), pp.8-12.

(5) New claims; constitutional concerns. There ar(.1. however, other claims and defenses that may not be triable under a general denial. Some of those claims, which did not at all er.Ist in the

times of Wing and Wayne, must be affirmatively pleaded. One significant claim, perhaps the most significant from the standpoint of public policy, is that .of unlawful discrimination. In fair housing cases, perhaps especially in cases of disability-related discrimination, our law does not impose insurmountable pleading and procedure requirements. See, Boston Housing Authority v. Bridgewaters, 452 Mass. 833, 844-848, 898 N.E.2d 848, 856-859 (2009).

The defendants argue that by operation of the Supremacy Clause of the United States Constitution, discrimination claims that are based on federal law preclude state law pleading and procedure requirements. My rulings in this case need not reach the defendants' preemption argument, which is based in pa::t on a specific provision of the Fair Housing Act, 42 U.S.C. §3615. However, I am aware of no case holding that a fair housing law claim, defense, or counterclaim cannot be heard and determined in summary process, this despite the specific language of 'the Rent Withholding Law, Gen.L. c.239 §8A, which purports to limit counterclaims under that-statute to cases of "nonpayment of rent, or where the tenancy has been terminated without fault of the tenant or occupant."

(6) Other equitable claims and defenses. Other claims and defenses, some of which did not exist when the Wing and Wayne cases were decided, appear to be equitable in nature such that they must be affirmatively pleaded. These include claims of estoppe:_, breach of covenant of good faith and fair dealing, violation of the Consumer Protection Act, Gen.L. c.93A, and of the Fair Debt Collection Practices Act, 15 U.S.C. §1692 et seq., which are often based on failures to comply with the federal HoMe liTfordable Modification Program [HAMP] .[5]/

One can expect these types of claims and counterclaims to continue, with the recent enactment of St.2012 Ch.194, approved August 3, 2012, entitled "An Act Preventing Unlawful and Unnecessary Foreclosures." The law amends Gen.L. c.244. §14, and *inserts* after §35A two new sections §35B and §35C. There are significant features: Under Gen.L. c.244 §35B(b) a creditor cannot publish the statutory notice of foreclosure sale on certain mortgage loans for owner-occupied residential property "unless it has first taken reasonable steps and made a good faith 'affort to avoid foreclosure"; under Gen.L. c.244 .§35B(c) "the creditor shall

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5/ The HAMP program is a component of the ME.}:ing Home Affordable Program [MHAP] program established by the United States Department of the Treasury under the Troubled Asset Relief Program [TARP] that was created by the Emergency Economic Stabili::ation Act EEESAJ, 12 U.S.C. §5201 et seq. See, httn://www.hmtadmin.com/portaliDrograms/docs/hamp servicer/mhahandbook 33,pdf.

send notice ... of the borrower's rights to pursue a modified mortgage loan"; under Gen.L. c.244 §35C(h) in an offer to purchase by a nonprofit entity no creditor shall require as a condition of sale an "agreement limiting ownership or occupancy of the residential property by the borrower."

* * *

There is no good reason that these matters can not and should not be adjudicated in one case, in one court, with one judge or jury, and to conclusion.li

The Supreme Judicial Court has twice indicated its view, in Bailey at 334, 951 N.E.2d at 336, and in Eaton at 574, fn.9, 969 N.E.2d at 1123, fn.9, that all cognizable claims, defertses, and counterclaims, and factual issues related thereto, in post-foreclosure eviction cases should have a "just, speedy, and inexpensive determination" in one case, in one court, by one judge or jury, and should not be unduly delayed by ce:·tificial distinctions of pleading and procedure or by imaginary differences of subject matter jurisdiction among the *seven* departmenos of the Trial Court.?

I hold that counterclaims may be raised in post-foreclosure residential housing summary process cases; that claims and defenses both at law and in equity may be tried in summary process; and that all issues of fact relevant thereto may be adjudicated in the Rousing Court in such actions.

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6/ As I noted in my prior ruling in this case it is my view that MRCvP Rule 18 (joinder), Rules 12(b)(6) and 12(f) (failure to state a claim or defense) and Rule 56 (summary judgment) all work well to generouSly allow the pleading and joinder of claims, counterclaims, and affirmative defenses, and to facilitate dismissal on the merits of claims and defenses that are legally frivolous or factually spurious.

7/ The plaintiffs argue that the Supreme Judicial Court's recent citation and quotation of the Wing and Wayne cases in Bailey, at 333, 951 N.E.2d at 335-336, shows recent and general approval of the holdings in those cases. Although I found the argument persuasive when I issued my prior rulings, I am no longer persuaded because the Court refers to the Wing and Wayne cases in its Bailey decision only to show that "Challenging a pLaintiff's entitlement to possession has long been considered a valid defense to a summary process action for eviction where the property was purchased at a foreclosure sale." The Court's mention of the Willa and Wayne cases in Bailey is in support of what can, not what cannot, be raised as a defense in summary process. It may (or may not) be significant that in Eaton at 575, 969 N.E.2d at 1124, the Court repeated the quotation, without mentioning the Wing and Wayne cases.

ORDER

The motion by the defendants filed on July 13, 2012, for reconsideration of the Ruling and Order issued on May 23, 2012, allowing the motion by the plaintiff filed on April 3, 2012, to strike and dismiss affirmative defenses and counterclaims, is allowed.

Part 1 of the prior Ruling and Order as allowed the plaintiff's motion to strike and dismiss defenses and counrclaims that are based on habitability, quiet enjoyment, rent withholding and other landlord tenant law is confirmed. Part 2 of the Ruling and Order as allowed the plaintiff's motion to strike and dismiss other affirmative defenses and counterclaims is vacated, and in that respect the plaintiff's motion is denied.

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David D. Kerman
Associate Justice:

Dated: August 31, 2012

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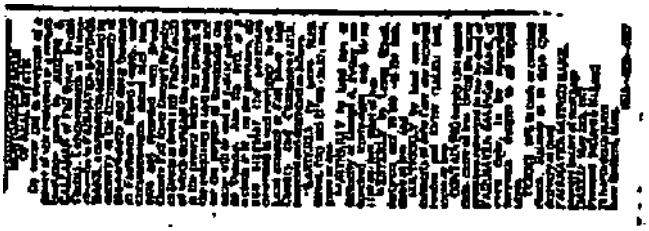

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